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Spoliation of Electronic Evidence: Sanctions versus Advocacy

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SPOLIATION OF ELECTRONIC EVIDENCE: SANCTIONS VERSUS ADVOCACY

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*“Spoliation, in case you haven’t heard, is the newest battleground
of contemporary litigation, now a continuing sideshow, if not the
main event, in courtrooms across the country.”*

—Robert E. Shapiro¹

INTRODUCTION

The rapid growth of electronic information has created new opportunities for litigators to prove facts at trial. The increasing use of email and other forms of real-time electronic communication has enabled litigators to provide fact finders with highly persuasive contemporaneous records that were unavailable two decades ago. These records can be particularly revealing since people frequently use emails and other new forms of communication casually, without imagining that they might one day surface at a trial. Litigators, by contrast, have come to expect that electronically stored information will be available at trial, greatly expanding the scope of discovery.

* Professor of Law, The University of Tulsa College of Law. I want to thank Steven Gensler and Richard Marcus for helpful comments and suggestions on an earlier draft of this Article. I am also grateful to my colleague, Sam Halabi, for his careful review of this Article. In addition, I acknowledge financial support from a University of Tulsa Research Grant.

1. Robert E. Shapiro, *Advance Sheet: Conclusion Assumed*, LITIG., Spring 2010, at 59.

While providing new sources of proof, emails and other forms of electronically stored information (“ESI”) have also increased the costs of litigation. Retrieving and reviewing electronically stored information can be far more expensive than creating and storing it.² Organizations and even individuals increasingly retain large volumes of electronically stored information, and consequently, they may have a substantial amount of potentially relevant electronically stored information. The usefulness of the electronically stored information in litigation is often unknown, however, until an attorney actually reviews it.

Production and review of electronically stored information is expensive, sometimes monstrously so. Attorneys required to produce electronically stored information may need to hire information technology experts to retrieve it and then spend hours reviewing it for privilege and responsiveness. Opposing counsel then must spend hours reviewing the electronically stored information for relevance and usefulness.³

Although electronically stored information may be stored indefinitely, it is also readily altered or destroyed. Authors of embarrassing emails may be tempted to delete copies of the emails from their outboxes in order to prevent them from coming to light in litigation. Of course, other copies of the emails might be recovered from the inboxes of their recipients, or else from servers or backup devices, but recovery from these alternative locations may be more expensive or not feasible. Furthermore, some types of electronic information may not be intended to be stored, or they may be routinely overwritten or destroyed in the ordinary course of business. In addition, electronically stored information may be deleted accidentally.

Spoliation refers to the destruction or significant alteration of evidence.⁴ Spoliation has a long history in the courts, but the vulnerability of electronically stored information to deletion or alteration has generated increasing concern by attorneys and courts. Judges seek ways both to deter spoliation and provide an adequate remedy when it does occur. Increasingly, courts are turning to sanctions to curtail spoliation. A recent survey of over 400 federal

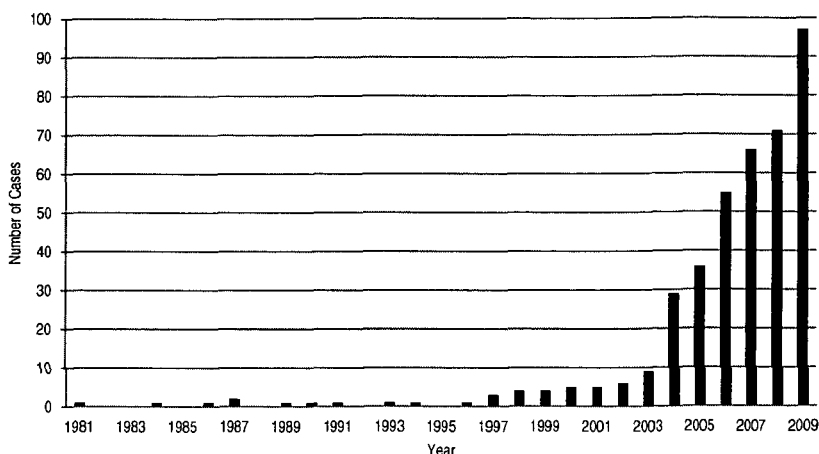
2. See James N. Dertousos et al., *The Legal and Economic Implications of Electronic Discovery*, RAND CORP., 2 (2008), available at http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf (“Despite the potential of computer technology to make storage, search, and exchange of information less expensive and less time-consuming, the most frequent issue raised by those we interviewed was the enormous costs—in time and money—to review information that is produced.”).

3. See Lorna G. Schofield, *Opening Statement*, LITIG., Spring 2010, at 1, 56 (“[D]iscovery accounts for most of the cost of litigation, and . . . more than half of the cost of discovery comes from the relevance and privilege review, the mind-numbing tasks that employ our youngest lawyers.”).

4. See *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”).

cases involving motions for sanctions in connection with electronic discovery appears below.⁵

ANNUAL NUMBER OF E-DISCOVERY SANCTION CASES



This graph is alarming, because it shows a rapid acceleration of motions for sanctions involving electronic discovery in the past few years.⁶ The survey reported that the most frequent ground for sanctions was spoliation.⁷ Motions for sanctions add to the cost of litigation and take up time that could be better spent on the merits of the cases.⁸ The dramatic increase in

5. Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 795 (2010) (graph reproduced with permission).

6. Other surveys show large increases in the number of motions for sanctions and discovery disputes over the past decade. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 551 n.15 (2010) (searching Westlaw's ALLFEDS database for "discovery dispute" yields similar results); John M. Barkett, Partner, Shook, Hardy & Bacon L.L.P., *Walking the Plank, Looking over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* Presentation at the Federal Civil Rule Advisory Committee's Conference on Civil Litigation at Duke Law School 16 (May 10, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/John%20Barkett,%20Walking%20the%20Plank.pdf> (searching federal cases in Westlaw and Lexis databases involving sanctions motions shows large increases for past decade).

7. See Willoughby et al., *supra* note 5, at 803 ("In the 230 cases in which sanctions were awarded, the most common misconduct was failure to preserve ESI, which was the sole basis for sanctions in ninety cases.").

8. See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010) ("Finally, I note the risk that sanctions motions, which are very, very time consuming, distracting, and expensive for the parties and the court, will be increasingly sought by litigants. This, too, is not a good thing." (footnote omitted)). Judge Scheindlin, the trial judge in this case, stated that she and her two law clerks had spent "an inordinate amount of time on [the] motion. We estimate that collectively we have spent close to three hundred hours . . ." *Id.* at 471 n.56.

motions for sanctions is also likely to produce collateral consequences besides the time and expense directly spent on them by attorneys and judges.

Motions for sanctions are unpleasant for litigants, attorneys, and judges due to their inherently punitive nature, and litigants and attorneys tend to take them personally. Consequently, motions for sanctions exacerbate the tensions between opposing parties and attorneys. As a result, they may interfere with the development of cooperation and trust necessary for the efficient handling of electronic discovery.⁹ In addition, the potential threat of sanctions may contribute to the cost of litigation by inducing parties to preserve documents unnecessarily that would be neither admissible nor discoverable.¹⁰

Furthermore, the availability of sanctions may encourage the use of electronic discovery as a litigation weapon rather than as a means to prepare for trial. For example, one party may make a sweeping request for electronic evidence in order to drive up the costs of litigation for the producing party in order to gain leverage for a favorable settlement.¹¹ In addition, a party might attempt to exploit the inadequacies of an opposing party's computer system by making a request for electronic evidence not because the attorney wants the evidence to use at trial, but rather for the purpose of finding that some electronic evidence has been lost or destroyed and then seeking sanctions.¹²

The recent rise in motions for sanctions involving electronic discovery is reminiscent of the proliferation of motions for sanctions under Federal Rule of Civil Procedure 11¹³ between 1983 and 1993. While the increase in sanctions for spoliation appears related to the greater availability of electronic evidence, the 1983 amendments to Rule 11 were the cause of the proliferations of sanctions under Rule 11.

The 1983 amendments to Rule 11 were made because experience had shown that the original version of the rule was ineffective at deterring abuse.¹⁴ New language was added to reduce judges' reluctance to impose sanctions by expressly authorizing courts to impose sanctions, including

9. See *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) ("Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.").

10. See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) ("The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.").

11. See *Barkett*, *supra* note 6, at 12.

12. See *Beisner*, *supra* note 6, at 571.

13. FED. R. CIV. P. 11.

14. *Id.* advisory committee's note to 1983 amendment ("Experience shows that in practice Rule 11 has not been effective in deterring abuses.").

reasonable attorneys' fees, for violations of the rule.¹⁵ The federal courts responded vigorously to the 1983 amendments.¹⁶ The number of reported Rule 11 decisions soared from just a handful of cases before 1983 to over 3,000 by the end of 1990.¹⁷ The spike in motions for sanctions generated considerable controversy, and both bench and bar seemed preoccupied with Rule 11.¹⁸ The Sixth Circuit summarized the fallout from the 1983 amendments as follows:

The application of the 1983 version of Rule 11 provoked considerable commentary and was criticized for spawning satellite litigation, abusing the rule's potential as a fee-shifting device, exacerbating incivility among lawyers and between bench and bar, chilling creative advocacy, and disproportionately impacting plaintiffs over defendants, particularly in the civil rights arena.¹⁹

The 1993 amendments to Rule 11 responded to concerns about the overuse of sanctions by placing various constraints on their imposition.²⁰ These included adding a "safe harbor" provision²¹ and limiting the amount of sanctions to what is sufficient for deterrence rather than what would compensate the moving party for the expense of the motion.²² The 1993 amendments appear to have succeeded in causing the furor over Rule 11 to subside, as there have been no subsequent substantial amendments to the rule.

15. *Id.* ("The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.").

16. See William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 11 (1994) ("[T]here appears to be consensus among proponents as well as opponents that the 1983 amendment had a significant effect on practice in the federal courts, even if the precise nature and extent of that effect was not quantifiable.").

17. Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 480 (1991).

18. See *id.* at 476 ("Rule 11 has become one of the most controversial topics in the federal courts over the last eight years."); Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39, 83 (1994) ("Over the last ten years, federal practitioners and judges have been quite preoccupied with Federal Rule of Civil Procedure 11.").

19. *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997).

20. *Id.* ("Responding to these concerns, Rule 11 was substantially revised in 1993. The new language broadens the scope of attorney obligations but places greater constraints on the imposition of sanctions.").

21. FED. R. CIV. P. 11, advisory committee's note to 1993 amendment ("These provisions are intended to provide a type of 'safe harbor' against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.").

22. *Id.* ("The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.").

Concerns with overuse of sanctions now focus on the spoliation of electronic evidence²³ rather than Rule 11. In addition to dismissals, default judgments, and monetary sanctions, courts have also imposed adverse inference jury instructions as sanctions in a number of cases. A recent survey revealed that the federal courts imposed adverse jury instructions in fifty-two²⁴ of the 230 cases in which electronic discovery sanctions were imposed.²⁵ While adverse inference jury instructions are not expressly authorized as sanctions for violations of discovery obligations in Federal Rule of Civil Procedure 37,²⁶ courts have relied on their inherent authority to impose adverse inference instructions to punish the spoliation of evidence.²⁷

This Article proposes that courts should refrain from imposing adverse inference jury instructions as sanctions for the spoliation of evidence. This proposal bears some similarity to the approach taken twenty years ago by the 1993 amendments to Rule 11, which constrained courts' ability to sanction.

Instead of imposing an adverse jury instruction as a sanction for spoliation of evidence, courts should allow evidence of spoliation to be admitted at trial if a reasonable jury could find that spoliation had occurred and if the spoliation was relevant to a material issue. If a court allows the introduction of evidence of spoliation at trial, it should also allow argument by attorneys on whether the jury should infer that the spoliated evidence was unfavorable to the spoliator. This does not require an adverse inference instruction. Instead, the court should rely on attorney advocacy and the good sense of jurors to decide whether spoliation has occurred, and if so, how the proof of spoliation should affect the outcome of the trial.

Following this introduction, the Article examines how courts have traditionally dealt with the spoliation of evidence. Next the Article discusses the

23. See *Rinkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) ("Spoliation of evidence—particularly of electronically stored information—has assumed a level of importance in litigation that raises grave concerns."); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 516 (D. Md. 2010) ("Recent decisions, discussed below, have generated concern throughout the country among lawyers and institutional clients regarding the lack of a uniform national standard governing when the duty to preserve potentially relevant evidence commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence and whether it is tempered by the same principles of proportionality that Fed.R.Civ.P. 26(b)(2)(C) applies to all discovery in civil cases.").

24. See Willoughby et al., *supra* note 5, at 811 ("In fifty-two cases, courts sanctioned parties for e-discovery violations by issuing adverse jury instructions. Courts deferred judgment on this issue in another ten cases.").

25. *Id.* at 803.

26. FED. R. CIV. P. 37(b) provides for orders directing that designated matters be taken as established for purposes of the action as possible sanctions, but it does not expressly authorize adverse inference instructions as sanctions.

27. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

current law on inferences and presumptions under the Federal Rules of Evidence.

Then the Article provides an analysis of two landmark decisions from 2010 on the spoliation of evidence and adverse inferences. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, Judge Scheindlin imposed an adverse inference instruction as a sanction for certain parties' grossly negligent conduct.²⁸ The instruction included a presumption that the spoliated evidence was both relevant and would have been favorable to the innocent parties. In *Rimkus Consulting Group, Inc. v. Cammarata*, Judge Rosenthal also imposed an adverse inference instruction as a sanction, but she based the sanction on evidence that the spoliation was intentional.²⁹ In addition, she framed the jury instruction as an inference rather than a presumption.³⁰

After the analysis of *Pension Committee* and *Rimkus*, the Article urges courts to rely on attorney advocacy rather than sanctions to address the spoliation of evidence in most cases. A brief conclusion follows.

I. TRADITIONAL TREATMENT OF SPOLIATION

While the spoliation of electronic evidence is a fairly recent development, courts have been dealing with spoliation of other forms of evidence for hundreds of years. Spoliation has been described both as threatening the integrity of the judicial process³¹ and also as commonplace.³² Spoliation

28. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 478 (S.D.N.Y. 2010).

29. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 610 (S.D. Tex. 2010).

30. An inference is a deduction based on logic and experience, but a presumption is a rule of law. For further discussion of the distinction between an inference and a presumption, see *infra* text accompanying notes 113–114.

31. *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 258–59 (2007) (“Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. . . . [W]hen critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures—and our civil justice system suffers.”); Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991) (“Spoliation is an effective, and, I believe, a growing litigation practice which threatens to undermine the integrity of civil trial process. It is a form of cheating which blatantly compromises the ideal of the trial as a search for truth.”).

32. See Nesson, *supra* note 31, at 793 (“It is impossible to know precisely how common spoliation is today. Interviews and surveys of litigators suggest a prevalent practice.”); Dale A. Oesterle, *A Private Litigant’s Remedies for an Opponent’s Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1185 (1983) (“Businesses routinely destroy documents in order to keep the documents out of the hands of opponents in future legal proceedings.”); Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1218 (2004) (“In fact, according to many judges and practitioners, evidence tampering is hardly confined to blockbuster events. Documents that should be produced in response to a discovery request are regularly shredded, altered, or suppressed.” (footnote omitted)).

became a subject of national attention in 2001 when the Arthur Andersen accounting firm shredded more than a ton of documents and deleted around 30,000 emails and computer files in response to the SEC investigation of its client, the Enron Corporation.³³

Probably the earliest reported decision involving the spoliation of evidence is *Rex v. Arundel*,³⁴ from 1617. In *Arundel*, the Chancery Court decided that deeds giving good title in particular lands to the defendants were “very vehemently suspicious to have been suppressed and with-helden by some under whom the defendants claimed.”³⁵ Consequently, the Chancery Court issued a decree granting the lands to the King until the defendants produced the missing deeds.

A case from 1722, *Armory v. Delamirie*,³⁶ involved a chimney sweeper’s boy who found a jewel and then took it to a goldsmith’s shop to determine what it was. After the goldsmith’s apprentice took out the stones and returned the socket without the stones, the chimney sweeper’s boy brought an action for trover against the goldsmith. To prove damages, the plaintiff called several jewelers who testified to the value of “a jewel of the finest water that would fit the socket.”³⁷ The trial judge then directed the jury that unless the defendant produced the actual jewel and showed it not to be of the finest water, the jurors “should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.”³⁸ The presumption from the *Armory* case was incorporated into “that favorite maxim of the law, *omnia presumuntur contra spoliato-rem*,”³⁹ which means “[a]ll presumptions are against one who wrongfully dispossesses another (a despoiler).”⁴⁰

Wigmore classified spoliation of evidence as a type of conduct that provides evidence of consciousness of a weak case.⁴¹ Rather than handling spoliation through a presumption, Wigmore reasoned that the conduct of a spoliator gave rise to a powerful inference:

It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party’s *falsehood* or *other*

33. See Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and “Good Corporate Citizenship”*, 76 ST. JOHN’S L. REV. 979, 1011–12, 1012 n.152 (2002).

34. *R v. Arundel*, (1617) 80 Eng. Rep. 258 (K.B.); 1 Hob. 109.

35. *Id.* at 258.

36. *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (K.B.); 1 Str. 505.

37. *Id.*

38. *Id.*

39. 1 SIR T. WILLES CHITTY ET AL., SMITH’S LEADING CASES 404 (13th ed. 1929) (“The third point decided in this case is an illustration of that favourite maxim of the law, *omnia presumuntur contra spoliato-rem*; which signifies that if a man, by his own tortious act, withhold the evidence by the nature of his case would be manifested, every presumption to his disadvantage will be adopted.”).

40. BLACK’S LAW DICTIONARY 1857 (9th ed. 2009).

41. 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 277 (4th ed. 1979).

fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.⁴²

Wigmore also described a separate, more specific inference that may arise from spoliation: that the evidence a party fails to produce was unfavorable to that party. Wigmore wrote:

The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a *particular element* in the cause. The failure to bring before the tribunal some circumstance, document or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause*. Ever since the case of the Chimney Sweeper's Jewel, this has been a recognized principle.⁴³

Wigmore continued that while courts generally recognized some sort of adverse inference from a party's nonproduction or suppression of documents or chattels, they were less certain about some aspects of the adverse inference. First, he observed that spoliation might give rise to a presumption of law, which would shift the burden of producing evidence to the spoliator,⁴⁴ but it was not clear whether it did.⁴⁵ Courts also disagreed about

42. *Id.* § 278 (emphasis in original).

43. *Id.* § 285 (footnote omitted).

44. *Id.* § 291.

45. 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2524 (4th ed. 1981) ("But that a rule of presumption [for spoliation of evidence] can be predicated is doubtful.").

whether the inference from spoliation was sufficient by itself to prove that the contents of a missing document were unfavorable, or whether additional evidence of the contents should be required. While recognizing contrary authority in the cases, Wigmore concluded that the inference from spoliation should be sufficient proof that its contents were unfavorable “*provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference.*”⁴⁶

Wigmore added that nothing like specific details of contents should be required, but instead only “such evidence as goes to general marks of identity.”⁴⁷ In other words, Wigmore would mandate only some evidence of the general nature of the missing document to support the adverse inference.⁴⁸ Once there has been proof of spoliation, it is a proper subject of argument by counsel.⁴⁹

The two types of inferences that may be drawn from spoliation are illustrated by *Anderson v. Litzenberg*.⁵⁰ There, the plaintiff was injured when a tarp covering the load in a dump truck came loose and struck an oncoming vehicle, causing its driver to lose control, cross the dividing line, and crash head-on into the plaintiff’s pickup truck. After the accident, the owner of the dump truck discarded its tarp system. The trial judge gave the following jury instruction, to which the owner of the dump truck objected: “[D]estruction of evidence by a person gives rise to an inference or presumption unfavorable to spoiler, and, secondly, if the intent was to conceal the nature of the defect the destruction must be inferred to indicate a weakness in the case.”⁵¹

In affirming, the appellate court reasoned that since a party would normally be expected to preserve evidence that was favorable to its case, it was logical to infer from a failure to preserve particular evidence that the unpreserved evidence was probably unfavorable. Accordingly, it held that even if “the jury concluded that [the dump truck owner’s] decision to throw away the tarp was merely the product of innocent mistake, the jury could still pre-

46. 2 WIGMORE, *supra* note 41, § 291.

47. *Id.*

48. See generally *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998) (“[T]he prejudiced party may be permitted an inference in his favor so long as he has produced some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files.”); Drew D. Dropkin, Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1825 (2002) (“[Wigmore’s] rule is premised on the rationale that extrinsic evidence of the contents should not be required *because*, by supposition, the evidence has been deliberately destroyed or withheld.”).

49. 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1807 (4th ed. 1979) (“Where the existence of a material document or witness has appeared in the course of the testimony and yet the *opponent* has *not produced the witness or document*, the failure to produce is in evidence from the very nature of the situation, and therefore, when relevant, may be referred to [in argument by counsel].” (citations omitted)).

50. *Anderson v. Litzenberg*, 694 A.2d 150 (Md. Ct. Spec. App. 1997).

51. *Id.* at 155.

sume that, at the time of the accident, the tarp was in a defective, or otherwise unfavorable, condition.”⁵² The appellate court added that if the jury concluded that the dump truck owner discarded the tarp with the intent to conceal that it was defective, it could also infer that the dump truck owner was conscious that it had a weak case.⁵³

McCormick on Evidence (“*McCormick*”) treats spoliation of evidence as a form of admission by conduct.⁵⁴ When a party resorts to spoliation, that party provides a basis for inferring that the party believes the case could not be won without destroying evidence.⁵⁵ In order for this reasoning to work, the spoliator must have been either the party or someone connected to the party.⁵⁶ In addition, the circumstances of the spoliation must demonstrate bad faith because a showing of negligence would not support the inference that the party was aware of the weakness of the case.⁵⁷

McCormick questions the probative value of spoliation with respect to an adverse inference, particularly where the spoliation is not directed towards the suppression of a particular fact. It concludes by noting that some recent cases have indicated a willingness to rethink the traditionally established principles, and that the law appears to be in flux, with the patterns of the new order not yet clear.⁵⁸

Courts and commentators have identified two rationales for adverse inferences.⁵⁹ The first is the evidentiary or remedial rationale discussed above. The other rationale is prophylactic or punitive. As *McCormick* explains,

52. *Id.* at 156.

53. *Id.*

54. KENNETH S. BROWN, *MCCORMICK ON EVIDENCE* § 265 (6th ed. 2006) [hereinafter *MCCORMICK*] (“As might be expected, wrongdoing by the party in connection with its case amounting to an obstruction of justice is also commonly regarded as an admission by conduct.”).

55. *Id.* (“By resorting to wrongful devices, the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means, or in criminal cases that the accused is conscious of guilt.”).

56. *Id.* (“The actor must be connected to the party, or, in the case of a corporation, to one of its superior officers.”).

57. *Id.* (“Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case.”). An influential law review article explains the reasoning behind the adverse inference and the need for bad faith as follows:

[Spoliation] indicates a belief relevant and detrimental to some feature of his case; therefore he holds that belief; therefore his case in this feature is defective. But if the litigant’s conduct results only from happy-go-lucky carelessness, and not from specific motive or intention to achieve a specific end, the whole backbone of the formula breaks. The necessary showing of belief is lacking.

John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 *YALE L.J.* 226, 235 (1935).

58. *MCCORMICK*, *supra* note 54.

59. See *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982); *MCCORMICK*, *supra* note 54; Maguire & Vincent, *supra* note 57, at 227.

“[t]he real underpinning of the rule of admissibility may be a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof.”⁶⁰

The prophylactic or punitive component has been part of the adverse inference for spoliation from almost the beginning. As Judge (now Justice) Breyer pointed out in *Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*,⁶¹ the judge in the *Armory* case instructed the jury to base the chimney sweeper’s damages on the value of jewels “of the finest water” in order to “presume the strongest” against the goldsmith, as opposed to instructing the jury to infer only that the jewels had some value.

Depending on the circumstances, the evidentiary and punitive bases for adverse inference for spoliation may overlap. A showing that a party used an “Evidence Eliminator” program to erase computer files shortly after a court ordered their preservation may provide strong circumstantial evidence of their probable content⁶² as well as grounds for punishment of the spoliator.⁶³ The circumstantial evidence of intentional spoliation of evidence supports both the evidentiary and punitive components for an adverse inference. In contrast, the negligent loss of computer files would not support an inference concerning their probable content.⁶⁴

60. McCORMICK, *supra* note 54. Professor Nance has noted that this statement was not in the original edition of McCormick’s treatise but was added after his death to subsequent editions. Dale A. Nance, *Adverse Inferences About Adverse Inferences: Restructuring Judicial Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U. L. REV. 1089, 1102 n.48 (2010).

61. *Nation-Wide*, 692 F.2d at 218.

62. *See id.* (“The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document.”).

63. *See id.* (“Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk.”).

64. *See* *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 526 (D. Md. 2010) (“For example, an adverse inference instruction makes little logical sense if given as a sanction for negligent breach of the duty to preserve, because the inference that a party failed to preserve evidence because it believed that the evidence was harmful to its case does not flow from mere negligence—particularly if the destruction was of ESI (electronically stored information) and was caused by the automatic deletion function of a program that the party negligently failed to disable once the duty to preserve was triggered.”); McCORMICK, *supra* note 54, § 265 (“Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak cause.”); Maguire & Vincent, *supra* note 57, at 235 (“[T]rue implied admissions arising from ‘spoliation’ and the like must involve an element of deliberation or intention, negligence by itself being insufficient.”); Dale A. Nance, *Evidential Completeness and the Burden of Proof*, 49 HASTINGS L.J. 621, 638 (1998) (“[I]t is reasonable to make an adverse inference against [a spoliator] only when that party acted in bad faith, that is, with the intent to deprive the tribunal of evidence. Only then is there reason to believe that the evidence suppressed would have been unfavorable to the suppressing party.”).

Under the federal rules governing discovery, sanctions may also give rise to an adverse inference instruction. Federal Rule of Civil Procedure 37 authorizes a court to impose a variety of sanctions on a party who fails to obey an order to provide discovery,⁶⁵ including an order to produce documents that were requested under Rule 34.⁶⁶ The sanctions include (1) directing designated facts to be taken as established for purposes of the action, (2) prohibiting a party from supporting or opposing designated claims or defenses, or introducing designated matters in evidence, (3) striking pleadings in whole or part, (4) staying proceedings, (5) dismissing the action, (6) entering a default judgment, (7) holding a party in contempt of court, and (8) requiring a party to pay reasonable expenses, including attorney fees, caused by its failure to obey the order.⁶⁷

Rule 37 does not expressly provide for an adverse inference instruction for spoliation, but its list of sanctions is nonexclusive. Also, the rule does provide for an order directing designated facts to be taken as established for purposes of the action,⁶⁸ which is similar to but even stronger than an adverse inference instruction. Accordingly, it would appear that the rule would authorize an adverse inference instruction as a sanction for violation of a court order for production of documents.⁶⁹

By its terms, Rule 37 applies only to violations of court orders, and thus does not cover spoliation of evidence when there is no order for production of documents or before the filing of an action.⁷⁰ Rule 34 limits requests for production to “items in the responding party’s possession, custody, or control,”⁷¹ and therefore it does not cover items that were destroyed before service of a request for production. Nevertheless, the courts have recognized their inherent power to impose sanctions for spoliation of evidence in circumstances outside of Rule 37 as an aspect of their inherent authority “to

65. FED. R. CIV. P. 37(b).

66. See FED. R. CIV. P. 34.

67. FED. R. CIV. P. 37.

68. See, e.g., *Ins. Corp. v. Compagnie des Bauxites*, 456 U.S. 694 (1982) (affirming order that imposed sanction of deeming personal jurisdiction established); *Smith v. Kmart Corp.*, 177 F.3d 19, 28–29 (1st Cir. 1999) (affirming instruction for jury to accept as true unsafe condition of store as sanction for defendant’s failure to produce loss control manager for deposition).

69. See *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1181–82, 1184 (10th Cir. 1999) (Federal Rule of Civil Procedure 37(b) authorized jury instruction that it “must presume” that evidence that party failed to produce would have been unfavorable to the defendant and favorable to the plaintiff).

70. See *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 104 F.R.D. 119, 121 n.1 (C.D. Cal. 1985) (“[The defendant] correctly argues that an order to provide or permit discovery must be in existence before Rule 37(b) sanctions may be awarded.”); *Iain D. Johnson, Federal Courts’ Authority to Impose Sanctions for Prelitigation or Pre-order Spoliation of Evidence*, 156 F.R.D. 313, 318 (1994).

71. See FED. R. CIV. P. 34(a)(1).

levy sanctions in response to abusive litigation practices”⁷² and “to fashion an appropriate sanction for conduct which abuses the judicial process.”⁷³

*Flury v. Daimler Chrysler Corp.*⁷⁴ provides an interesting example. The plaintiff in that case fell asleep while driving his pickup truck at fifty-five miles per hour and crashed into a tree. He was wearing a seatbelt, but his airbag failed to deploy and he suffered a back strain on account of the crash. Soon after the accident, the plaintiff’s lawyer sent a letter to the truck’s manufacturer notifying the manufacturer of the accident and the airbag’s failure to deploy. The manufacturer replied to the letter and requested the location of the vehicle for inspection purposes, but the plaintiff’s lawyer did not respond to the request. Sometime between six months and one year after the accident, the plaintiff’s insurer sold the truck for salvage, and the plaintiff had no knowledge of its whereabouts thereafter.⁷⁵

A little more than six years after the accident, the plaintiff filed a federal court action against the truck’s manufacturer claiming enhanced injury to his lower back as a result of the airbag’s failure to deploy on account of an alleged manufacturing defect. At the trial, the plaintiff introduced testimony from an accident reconstruction expert that the plaintiff’s truck must have been moving at more than fifteen miles per hour when it hit the tree. The expert’s testimony was based solely on the accident report and post-accident photographs of the truck. The expert also testified that generally airbags are designed to not deploy at speeds less than eight miles per hour, to sometimes deploy at speeds between eight and fourteen miles per hour, and to always deploy at speeds of fifteen miles per hour or more. The expert concluded that the airbag should have deployed because the plaintiff crashed into the tree at more than fifteen miles per hour.

At the conclusion of the trial, the judge explained what spoliation was and instructed the jury that spoliation creates a rebuttable presumption that evidence not preserved was unfavorable to the party who caused the spoliation. The judge further instructed the jury that if it found that the plaintiff disposed of the truck before giving the defendant an opportunity to inspect it, the jury could presume that there was no defect, but the plaintiff could rebut the presumption.⁷⁶ Despite the spoliation instruction, the jury returned a verdict of \$250,000 for the plaintiff.

On appeal, the Eleventh Circuit reversed, holding that dismissal was required for the plaintiff’s spoliation of the evidence and that the spoliation instruction was insufficient to cure the prejudice to the defendant. The ap-

72. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980) (permitting award of attorney fees for failure to comply with discovery orders and an order concerning the time for filing briefs if bad faith was found).

73. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991) (affirming assessment of attorney fees as sanction against party for bad faith conduct during litigation).

74. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005).

75. *Id.* at 940–42.

76. *Id.* at 943 n.9.

pellate court acknowledged that because dismissal is the most severe sanction, it should be ordered only where there is bad faith and lesser sanctions would not suffice. Still, the court determined that dismissal was warranted because the condition of the airbag and the truck was critical to the case, and the defendant was prejudiced by not being given an opportunity to examine them. The court set out the following five factors to assess whether to order dismissal as a sanction for spoliation of evidence:

(1) whether the defendant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded.⁷⁷

Similarly, an order of dismissal as a sanction for spoliation was affirmed in *Silvestri v. General Motors Corp.*,⁷⁸ another airbag case. The Fourth Circuit decided that although it was not clear whether the spoliation was negligent or deliberate, dismissal was not an abuse of discretion because the loss of the airbag evidence was critical to the central issue in the case, and therefore highly prejudicial to the defendant. The court held that dismissal for spoliation of evidence would be warranted either if the spoliator's conduct was so egregious that it justified forfeiture of the claim, or if the spoliation substantially prevented the defendant from putting on a defense.⁷⁹

The *Flury* and *Silvestri* cases demonstrate the desirability of allowing a court to impose a harsher sanction than an adverse inference instruction for spoliation of evidence because in some circumstances, an adverse inference instruction may not be sufficient to deter spoliation or provide an effective remedy.⁸⁰ An adverse inference is most appropriate when courts, relying on their inherent authority, determine that a particular act of spoliation merits a sanction less severe than dismissal.⁸¹

Although most courts have followed *McCormick*⁸² in requiring the spoliator to act in bad faith before giving an adverse inference instruction,⁸³ the

77. *Id.* at 945.

78. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (2d Cir. 2001).

79. *Id.* at 594.

80. *See Barker v. Bledsoe*, 85 F.R.D. 545, 548 (W.D. Okla. 1979) ("A presumption as to certain evidence is simply not sufficient to protect against [the destruction of evidence]."); Oesterle, *supra* note 32, at 1238 ("The hostile inferences created by destroying evidence do not seem to offset the strategic gains achieved by the document destroyer of preventing his opponent's use of a particularly damaging document or of adding excessive litigation costs to the opponent's case. Most importantly, the inferences may not be strong enough to counter an opponent's *remaining* documents, which are carefully retained because of their support of the opponent's case.") (emphasis in original).

81. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

82. *See McCormick*, *supra* note 54; *supra* text accompanying note 57.

83. *See, e.g., United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010) ("In general, the [adverse inference] instruction usually makes sense only where the evidence permits a

Second Circuit ruled in *Residential Funding Corp. v. DeGeorge Financial Corp.*⁸⁴ that negligent spoliation would suffice.⁸⁵ The Second Circuit based its decision to allow the use of an adverse inference instruction in cases of negligent spoliation on the prophylactic rationales of deterrence and retribution. These rationales were explained in *Turner v. Hudson Transit Lines, Inc.*⁸⁶ as follows:

It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is *adverse* to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.⁸⁷

The court added:

The adverse inference thus acts as a deterrent against even the negligent destruction of evidence. This is perfectly appropriate: deterrence is not a function limited to punitive sanctions where intent has been demonstrated. In the law of torts, for example, damages for negligence serve to deter such conduct in the future.⁸⁸

finding of bad faith destruction; ordinarily, negligent destruction would not support the logical inference that the evidence was favorable to the defendant.”) (emphasis removed); *Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009) (“In the Eleventh Circuit, ‘an adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.’” (quoting *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 946 (11th Cir. 2005))); *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005) (“The Fifth Circuit permits an adverse inference against the destroyer of evidence only upon a showing of ‘bad faith’ or ‘bad conduct.’” (quoting *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003))); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (“The adverse inference must be predicated on the bad faith of the party destroying the records.”); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (“An adverse inference about a party’s consciousness of the weakness of his case, however, cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.”); *Courtney v. Big O Tires, Inc.*, 87 P.3d 930, 933 (Idaho 2003) (“For the loss or destruction of evidence to constitute an admission, the circumstances must indicate that the evidence was lost or destroyed because the party responsible for such loss or destruction did not want the evidence available for use by an adverse party in pending or reasonably foreseeable litigation. The merely negligent loss of evidence will not support that inference, nor would the intentional destruction of an item that a party had no reason to believe had any evidentiary significance at the time it was destroyed.”).

84. *Residential Funding*, 306 F.3d at 107–08.

85. *Id.* at 108.

86. *Turner v. Hudson Transit Lines*, 142 F.R.D. 68 (S.D.N.Y. 1991).

87. *Id.* at 75.

88. *Id.* at 75 n.3.

Punishing the negligent spoliation of evidence deters spoliation by imposing the consequence of the spoliation on the spoliator, who would generally be the cheapest cost avoider.⁸⁹ The spoliator usually has access to the evidence and can prevent its spoliation through the use of ordinary care. If the goal of the litigation process is simply to achieve the optimal level of preservation of evidence, allocating the cost of spoliation onto the spoliator through an adverse inference instruction could well be appropriate. But the goal of litigation should be ascertaining the true facts in the case, not efficiently preserving evidence. Therefore, a jury should not be instructed to draw an inference for the sake of punishing a party unless there is a reasonable logical and evidentiary basis for the court's concluding that the inference is likely to be true.

For example, in the *Turner* case, the court ruled that an adverse inference instruction was not appropriate because there was no evidentiary support for an adverse inference. It explained:

In order to remedy the evidentiary imbalance created by the destruction of evidence, an adverse inference may be appropriate even in the absence of a showing that the spoliator acted in bad faith. However, where the destruction was negligent rather than willful, special caution must be exercised to ensure that the inference is commensurate with information that was reasonably likely to have been contained in the destroyed evidence. Where, as here, there is no extrinsic evidence whatever tending to show that the destroyed evidence would have been unfavorable to the spoliator, no adverse inference is appropriate.⁹⁰

Similarly, the *Residential Funding* court stated that “the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that ‘the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.’”⁹¹ Thus, under the Second Circuit precedent, an adverse inference instruction would be appropriate for negligent spoliation only if there was a

89. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 135 (1970) (“A pure market approach to primary accident cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply.”); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096–97 (1972) (arguing that promoting economic efficiency suggests “putting costs on the party or activity which can most cheaply avoid them”); James E. Ward IV, Note, *Rule 11 and Factually Frivolous Claims—The Goal of Cost Minimization and the Client’s Duty to Investigate*, 44 VAND. L. REV. 1165, 1185 (1991) (“Since the overall goal [of Rule 11] is cost avoidance and the party filing the suit is presumed to be able to avoid costs most cheaply, the Rule imposes the duty [to investigate the facts of a claim before pleading] on the filing party.”).

90. *Turner*, 142 F.R.D. at 77.

91. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002).

reasonable logical and evidentiary basis for the adverse inference. This basis could be provided by other evidence that would tend to show the destroyed evidence would have been unfavorable to the spoliator.

The *Residential Funding* court also stated that bad faith destruction of evidence provides sufficient circumstantial evidence for a reasonable trier of fact to infer that the evidence was unfavorable to its destroyer.⁹² The court added that a showing of gross negligence would support an adverse inference in some circumstances. Other intentional or grossly negligent acts that hinder discovery could support an adverse inference even if those acts did not actually cause the destruction of the evidence.⁹³

The Second Circuit also stated that the trial court's role with respect to spoliation was limited to deciding whether sanctions are warranted.⁹⁴ The Second Circuit explained that the trial court's decision should be based on whether there had been sufficient evidence for a reasonable jury to find that the spoliated material would have been unfavorable to the spoliator. It was then up to the jury to determine whether the spoliated material was actually unfavorable to the spoliator.⁹⁵ As a consequence, the jury would still be free to give an adverse inference instruction little weight unless it decided that there was a logical basis for inferring that the spoliated material was actually unfavorable to the spoliator.

In the absence of bad faith, there is no logical connection between spoliation and an inference that the spoliated material was unfavorable to the spoliator. The spoliator would need to have destroyed the material for an improper purpose in order for an adverse inference to have much force.⁹⁶ Therefore, without bad faith or other evidence of the content of the spoliated material, a jury would not be likely to draw an adverse inference from spoliation despite receiving an adverse inference instruction. Consequently, even though *Residential Funding* authorizes an adverse inference instruction in the Second Circuit as a sanction for grossly negligent spoliation, the sanction ought to have no effect in most cases that do not involve bad faith. Negligent spoliation cases would require some other evidence of the content of the spoliated material on which the jury could base an inference that the spoliated material was unfavorable to the spoliator.

Of course, the culpability surrounding spoliation is almost never black and white. There will often be an evidentiary basis for a reasonable jury to infer that spoliation was in bad faith rather than negligent or grossly negli-

92. *Id.*

93. *Id.* at 109–10, 113.

94. *Id.* at 109 n.4.

95. *Id.* (“Although the issue of whether evidence was destroyed with a ‘culpable state of mind’ is one for a court to decide in determining whether the imposition of sanctions is warranted, whether the materials were in fact unfavorable to the culpable party is an issue of fact to be determined by the jury.”).

96. See *supra* note 57 and accompanying text.

gent.⁹⁷ For example, in *Reilly v. Natwest Markets Group Inc.*,⁹⁸ which the *Residential Funding* court relied on in holding that gross negligence for spoliation by itself was sufficient to support a finding that the spoliated material was unfavorable to the spoliator,⁹⁹ the evidence would easily have supported a finding of bad faith as well. In *Reilly*, an employee brought a breach of contract action against his former employer. The defendant-employer at first refused to produce certain paper files that allegedly showed the plaintiff had been involved in various transactions for which the defendant had never compensated him. The defendant claimed that it did not have the files, but then delivered them to the plaintiff's counsel at 3 p.m. on the Friday before the Monday trial date.

At the final pretrial conference that Friday, the trial judge characterized the defendant's failure to produce the files earlier as bordering on willful misconduct and ruled that an adverse inference instruction was warranted.¹⁰⁰ In addition, the plaintiff was able to show that the defendant had sanitized the files because the files that the defendant produced contained only publicly available documents and did not include other material documents the plaintiff alleged had been in the files previously.¹⁰¹ At a hearing after the trial, the trial judge declined to impose additional sanctions and ruled that the defendant had been grossly negligent in searching for the files and failing to assure their integrity.¹⁰²

On appeal, the Second Circuit decided that the trial judge had not abused his discretion by giving the adverse inference instruction. The defendant had demonstrated "at least the gross negligence" found by the trial judge in light of the defendant's failure to produce the files until the eleventh hour and its sanitizing of the files.¹⁰³ Because the defendant had not produced critical files until the eve of trial and had removed particular documents from the files, a reasonable jury could have found bad faith in *Reilly* and inferred (from the finding of bad faith) that the defendant had also removed other unfavorable documents from the files.

Thus, while a trial judge in the Second Circuit could give an adverse inference instruction based on a judicial finding of gross negligence, a jury might determine that the spoliation was the result of bad faith rather than gross negligence. The jury could then infer, based on the spoliator's bad

97. *Residential Funding*, 306 F.3d at 108 ("[A] 'case-by-case approach to the failure to produce relevant evidence' was appropriate because '[s]uch failures occur 'along a continuum of fault—ranging from innocence through the degrees of negligence to with intentionality.''" (quoting *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988))).

98. *Reilly v. Natwest Mkts. Grp.*, 181 F.3d 253 (2d Cir. 1999).

99. *Residential Funding*, 306 F.3d at 109.

100. *Reilly*, 181 F.3d at 261.

101. *Id.*

102. *Id.* at 262.

103. *Id.* at 268.

faith and other evidence of the contents of the spoliated material, that the spoliated material was unfavorable to the spoliator.

One of the leading cases on the use of an adverse inference instruction as a sanction for the spoliation of electronic evidence is Judge Scheindlin's decision in *Zubulake v. UBS Warburg LLC*.¹⁰⁴ The plaintiff sought emails from the defendant in her gender discrimination in employment and retaliation lawsuit. Both the in-house and outside counsel for the defendant issued a litigation hold soon after the plaintiff filed her initial charge with the Equal Employment Opportunity Commission ("EEOC"), requesting that the parties preserve all data. The defense attorneys circulated the notice to many of the key players who worked with the plaintiff and were likely to have written or received emails that the plaintiff would later request. Nevertheless, a number of the key players failed to retain emails that related to the plaintiff's claims, and the court decided that the defendant's counsel failed to properly oversee the preservation process in several significant ways.¹⁰⁵ Many of the deleted emails were eventually recovered from the defendant's backup tapes or other sources, but they were not produced until twenty-two months after the first request. In addition, because some of the defendant's backup tapes had been recycled, it was clear that some emails were irretrievably lost. It was impossible, however, to tell how many emails were lost or what their contents were.¹⁰⁶

Nevertheless, the court concluded that the contents of the recycled tapes would have been at least as favorable to the plaintiff as the emails she had been able to obtain from the defendant, because of (1) the dates that the recycled backup tapes covered, (2) the content of emails recovered from other sources, and (3) the fact that the defendant's key players willfully deleted the emails.¹⁰⁷ The court emphasized that it was imposing the sanction due to the willful deletion of the emails by the defendant's employees rather than for the negligent loss of the backup tapes.¹⁰⁸ The court stated that it would give the following adverse inference instruction at trial:

You have heard that UBS failed to produce some of the e-mails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants' control and would have proven facts material to the matter in controversy.

If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are

104. See *Zubulake v. UBS Warburg LLC* (*Zubulake V*), 229 F.R.D. 422 (S.D.N.Y. 2004). This was the fifth published opinion in the case. *Id.* at 424 & n.5.

105. *Id.* at 435.

106. *Id.* at 427.

107. *Id.* at 437.

108. *Id.* at 437 n.99.

permitted, but not required, to infer that the evidence would have been unfavorable to UBS.

In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS's failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.¹⁰⁹

When imposing an adverse inference as a sanction, some courts have treated it as a presumption,¹¹⁰ while others treat it only as an inference.¹¹¹ One court recently decided that it should be treated as either a presumption or an inference depending on the nature of the spoliation.¹¹² The next section discusses the distinctions between inferences and presumptions and their current operation in the federal system.

II. PRESUMPTIONS UNDER FEDERAL RULE OF EVIDENCE 301

Both presumptions and inferences are used for proving material facts from the evidence presented at trial. An inference is based on logic and experience, and it may be defined as "a conclusion drawn from known or assumed facts or statements."¹¹³ In contrast, a presumption is a rule of law that shifts the burden of proof on an issue from one party to another. It may be defined as requiring that "when a basic fact is found to exist, the presumed fact is assumed to exist until the nonexistence of the presumed fact is determined."¹¹⁴

109. *Id.* at 439–40. The court adapted this jury instruction from 4 LEONARD B. SAND ET AL., *MODERN FEDERAL JURY INSTRUCTIONS* 75–77 (2004). *Zubulake V.*, 229 F.R.D. at 440 n.120.

110. *See* *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943 n.9, 945; *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1184 (10th Cir. 1999). *See also* *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (K.B.); 1 Str. 505 (directing the jury to "presume the strongest" against the goldsmith if he did not produce the jewel).

111. *See* *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 620, 646 (S.D. Tex. 2010); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 381 (D. Conn. 2007); *Zubulake V.*, 229 F.R.D. at 439.

112. *See* *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 470 (S.D.N.Y. 2010).

113. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007); *see also* CAL. EVID. CODE § 600(b) ("An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."); David W. Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281, 290 (1977) ("An inference is a deduction, warranted by human reason and experience, that the trier of fact may make on the basis of established facts—a process of reasoning from premise to conclusion without the directive force of a rule of law, which characterizes a presumption.").

114. UNIF. R. EVID. 301; *see also* CAL. EVID. CODE § 600(a) ("A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found

McCormick characterizes a “‘presumption’ as the slipperiest of the family of legal terms, except for its first cousin, ‘burden of proof.’”¹¹⁵ The term “burden of proof” is ambiguous because it comprises two separate burdens: the burden of producing evidence and the burden of persuasion.¹¹⁶ The burden of producing evidence refers to the requirement to put on a *prima facie* case so that the judge will allow the case to reach the jury. If a party with the burden of producing evidence fails to present sufficient evidence for a reasonable jury to find for that party, the judge may grant a motion for judgment as a matter of law against that party under Federal Rule of Civil Procedure 50(a).¹¹⁷

In contrast, the burden of persuasion refers to what the jury should do if it determines that the weight of the evidence from each side is evenly matched. The jury should be instructed that if evidence on an issue is exactly equal, the jury should resolve the tie against the party who has the burden of persuasion on that issue.¹¹⁸ The effect of presumptions on burdens of proof has been debated by scholars and in the courts for over a hundred years, and the debate continues.

The predominant view is probably the “bursting bubble” or Thayer-Wigmore theory,¹¹⁹ which applies presumptions only to the burden of producing evidence but not to the burden of persuasion. The alternative view, known as the Morgan-Maguire theory,¹²⁰ gives presumptions greater effect by applying them both to the burden of producing evidence and to the burden of persuasion.

Assume that a party who initially has the burden of proving Fact A offers proof of Fact B, and there is a presumption that Fact A is presumed if Fact B (the basic fact) is proved. Under the “bursting bubble” theory, the party satisfies the burden of producing evidence with respect to Fact A with the assistance of the presumption by offering proof of Fact B. In addition, the presumption shifts the burden of producing evidence with respect to Fact A to the opposing party.

The consequences of shifting the burden of producing evidence to the opposing party are that unless the opposing party offers evidence rebutting Fact A, the court will determine Fact A against the opposing party and direct the jury accordingly. Moreover, if Fact A resolves the case, the court may

or otherwise established in the action. A presumption is not evidence.”); *McCormick*, *supra* note 54, § 342 (“[A] presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts.”).

115. *McCormick*, *supra* note 54, § 342.

116. *Id.* § 336; 9 *Wigmore*, *supra* note 45, §§ 2485, 2487.

117. *FED. R. CIV. P.* 50(a).

118. *McCormick*, *supra* note 54, § 336.

119. See JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 380–84 (1898).

120. This view was recommended by Professors Morgan and Maguire in Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 *HARV. L. REV.* 909, 913 (1937).

grant judgment as a matter of law in favor of the party benefitting from the presumption. On the other hand, if the opposing party satisfies the burden of producing evidence by offering evidence against Fact A, “the rule of presumption has vanished”¹²¹ because the presumption does not affect the burden of persuasion. At the end of the trial, the judge should instruct the jury that the party with the initial burden of persuasion has the burden of persuasion with respect to Fact A, and there is no need to inform the jury of the presumption.

Professors Morgan and Maguire criticized the “bursting bubble” theory for giving too little effect to presumptions.¹²² They noted that the policy reasons for presumptions are the same as those for allocating the burden of persuasion, and they urged that presumptions should shift both the burden of producing evidence and the burden of persuasion.¹²³

The “bursting bubble” theory was adopted in the American Law Institute’s *Model Code of Evidence*,¹²⁴ but the greater weight of scholarly opinion, including McCormick¹²⁵ and Louisell,¹²⁶ supported the Morgan-Maguire theory. The *Uniform Rules of Evidence*¹²⁷ also adopted the Morgan-Maguire theory. More notably, the version of the Federal Rules of Evidence that the Advisory Committee proposed and the Supreme Court approved also chose the Morgan-Maguire theory. As submitted to Congress, Rule 301 provided: “In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.”¹²⁸ The accompanying Advisory Committee Note stated that Rule 301 was rejecting the “bursting bubble” theory because it gave too little effect to presumptions.¹²⁹

The Criminal Justice Subcommittee of the House Judiciary Committee then amended the proposed rule by limiting it to civil actions and also attempting to take an intermediate position between the “bursting bubble” and Morgan-Maguire theories.¹³⁰ The Subcommittee Note explained that under

121. THAYER, *supra* note 119, at 346, *quoted in* 9 WIGMORE, *supra* note 45, § 2487.

122. Morgan & Maguire, *supra* note 120.

123. *Id.*

124. *See* MODEL RULE EVID. 704(2) (1942).

125. *See* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 317 (1954) (“Accordingly, while the judge should be conceded a reasonable discretion whether or not to instruct the jury upon a given presumption arising in the case, it seems that the normal form of such instruction if one is given should place the burden on the opponent of overcoming the presumption by the preponderance of the evidence.”).

126. *See* Louisell, *supra* note 113, at 283, 320–21.

127. *See* UNIF. R. EVID. 301.

128. *See* FED. R. EVID. 301.

129. *Id.* advisory committee’s note.

130. The Subcommittee’s amendment provided:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed

its intermediate position “a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead [it] is merely deemed sufficient evidence of the fact presumed to be considered by the jury or other finder of fact.”¹³¹ The Senate criticized the House version’s treatment of presumptions as evidence, saying that it would be confusing to juries to weigh presumptions against evidence.¹³² The Senate therefore deleted the provision in the House bill that treated presumptions as evidence and adopted the following version of Rule 301:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.¹³³

Finally, the Conference Committee adopted the Senate version.¹³⁴ The consequence was that Congress wound up rejecting the Morgan-Maguire theory and adopting the “bursting bubble” theory in its place.¹³⁵

The Conference Report accompanying Rule 301 included the following statements:

If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the

the burden of going forward with the evidence, and, even though met with contradicting evidence, a presumption is sufficient proof of the fact presumed to be considered by the trier of the facts.

Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary, H.R., 93rd Cong. 364 (1973).

131. *Id.* subcommittee note; H.R. REP. NO. 93-650, at 7 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7081.

132. S. REP. NO. 93-1227, at 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7056.

133. FED. R. EVID. 301.

134. CONF. REP. NO. 93-1597, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099. The Federal Rules of Evidence were restyled in 2011. FED. R. EVID. 301 reads:

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

135. See *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 287–88 (3rd Cir. 2006) (“We have interpreted Rule 301 to express the Thayer-Wigmore “bursting bubble” theory of presumptions. . . . This view of Rule 301 is widely accepted.”).

presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.¹³⁶

Professor Louisell has pointed out that the first two sentences quoted above appear to confuse presumptions with inferences, and they should be corrected by substituting “must find” for “may presume.”¹³⁷

An inference permits a conclusion to be deduced from the proof of a fact, but a presumption requires a finding of the presumed fact from the proof of a basic fact unless the presumed fact is rebutted.¹³⁸ Thus, a presumption would require a court to find the presumed fact if the basic fact was proved in the absence of evidence to rebut the presumed fact, and it should instruct the jury accordingly.¹³⁹ If there was a jury issue concerning the existence of a basic fact, however, and there was no evidence to rebut the presumed fact, the jury would have to be instructed that it was required to find the existence of the presumed fact only if it determined that the basic fact existed.¹⁴⁰ Lastly, if there was evidence rebutting the presumed fact, the effect of the presumption would vanish under the “bursting bubble” theory of Rule 301, and the jury would be instructed concerning the burden of persuasion as it existed in the absence of the presumption.¹⁴¹ There would be no need to tell the jury about presumptions at all, and it probably would be less confusing for the court to avoid mentioning presumptions in

136. CONF. REP. NO. 93-1597, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099.

137. See Louisell, *supra* note 113, at 289, 319; see also Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843, 861 n.90 (1981) (“Clearly, the court should instruct the jury that it must find the presumed fact.”). But see 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5127 (2d ed. 2005) (following language in Conference Report verbatim).

138. See 1 JACK B. WEINSTEIN, MARGARET A. BERGER & JOSEPH M. McLAUGHLIN, *WEINSTEIN’S FEDERAL EVIDENCE*, § 301.02[1] (2010) [hereinafter WEINSTEIN] (“An inference is distinguished from a presumption in that in an inference, the existence of Fact B may be deduced from Fact A by the ordinary rules of reasoning and logic whereas in a presumption, the existence of Fact B must be assumed because of a rule of law.” (emphasis omitted)); Louisell, *supra* note 113, at 290 (“By definition, a presumption is a required conclusion in the absence of adequate countervailing evidence.”).

139. See Louisell, *supra* note 113, at 308–09.

140. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 510 n.3 (1993) (“If the finder of fact answers affirmatively—if it finds that the [basic fact] is supported by a preponderance of the evidence—it must find the existence of the presumed fact . . . and must, therefore, render a verdict for the plaintiff.” (emphasis omitted)); *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (“If the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.”); WEINSTEIN, *supra* note 138, § 301.04; Louisell, *supra* note 113, at 309. Professor Louisell called this a conditional instruction. *Id.*

141. See WEINSTEIN, *supra* note 138, § 301.04; Louisell, *supra* note 113, at 309. See generally *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 153 (2000) (holding that the case was properly submitted to jury after presumption was rebutted).

jury instructions.¹⁴² Depending on the case, though, it may be helpful for the court to give an inference instruction that parallels the presumption.¹⁴³

The operation of presumptions under Rule 301 is illustrated by *St. Mary's Honor Center v. Hicks*.¹⁴⁴ In an action against an employer for intentional racial discrimination in violation of Title VII of the Civil Rights Act of 1964,¹⁴⁵ the plaintiff relied on the presumption that if an employee establishes a prima facie case of discrimination, then it is presumed that the employer unlawfully discriminated against the employee.¹⁴⁶ Once the employee satisfies the requirements for the presumption by establishing a prima facie case of discrimination, the burden of producing evidence of a legitimate nondiscriminatory reason for the employer's actions shifts to the employer.¹⁴⁷

The employer in *St. Mary's* satisfied this burden by introducing evidence of two legitimate, nondiscriminatory reasons for its demotion and subsequent discharge of the employee. The trial court decided that these reasons were not the real reasons for the employer's actions, but nevertheless the trial court ruled that the employee had not satisfied his burden of proving that the employer unlawfully discriminated against him. The Supreme Court affirmed, holding that once the employer rebutted the presumption, the presumption simply dropped out of the picture because it had fulfilled its role under Rule 301 of forcing the employer to provide some sort of a response to the prima facie case presented by the employee.¹⁴⁸ The Court also held that the determination of whether the employer satisfied its burden of producing evidence to rebut the presumption should not involve a credibility assessment. If the employer offered any "evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action,"¹⁴⁹ the presumption was rebutted and the employee had the burden of proving that the employer unlawfully discriminated against him.

The next section examines two recent cases dealing with spoliation of evidence. In one,¹⁵⁰ the court imposed the sanction of a presumption against

142. See WEINSTEIN, *supra* note 138, § 301.04; Louisell, *supra* note 113, at 309. See generally *Sanghvi v. City of Claremont*, 328 F.3d 532, 540–41 (9th Cir. 2003) ("The technical elements of the presumptions and shifting burdens have significant potential to confuse juries."); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the [basic facts], presumptions, and the shifting burden of proof is unnecessary and confusing.").

143. WEINSTEIN, *supra* note 138, § 301.04; Louisell, *supra* note 113, at 309–11.

144. *St. Mary's*, 509 U.S. at 511.

145. 42 U.S.C. § 2000e-2(a)(1) (2006).

146. The Supreme Court created this presumption in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); see also *St. Mary's*, 509 U.S. at 506.

147. *St. Mary's*, 509 U.S. at 506–07.

148. *Id.* at 510–11.

149. *Id.* at 509.

150. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

parties who were grossly negligent in failing to produce electronic evidence. The presumption was that the missing evidence was relevant and the opposing parties were prejudiced as a result.¹⁵¹ In the other case,¹⁵² the court imposed an adverse inference instruction as a sanction against parties for intentionally and in bad faith deleting emails that were relevant to the opposing party's claims.¹⁵³

III. TWO APPROACHES TO SANCTIONS FOR SPOILIATION OF ELECTRONIC INFORMATION

Two distinguished federal judges issued landmark opinions in 2010 that took differing approaches to the spoliation of electronically stored information. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*,¹⁵⁴ Judge Scheindlin set out an elaborate framework for selecting from among various forms of adverse inference instructions based on the egregiousness of the spoliator's conduct.¹⁵⁵ In contrast, in *Rimkus Consulting Group, Inc. v. Cammarata*,¹⁵⁶ Judge Rosenthal chose to instruct the jury that it should decide whether the defendants intentionally deleted emails to prevent their use in litigation, and if so, whether to infer that the lost information would have been unfavorable to them.¹⁵⁷

Some of the differences between the two decisions may be attributable to the different factual contexts of the cases and to the federal courts' locations in different circuits,¹⁵⁸ but the decisions also reflect different approaches to adverse inference instructions.

A. Pension Committee of the University of Montreal Pension Plan v. Banc of America

Pension Committee arose out of an action by ninety-six investors for federal securities and New York common law fraud against two British Virgin Island hedge funds (the "Lancer Funds") and their administrators and

151. *Id.* at 478.

152. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

153. *Id.* at 644, 646.

154. *Pension Comm.*, 685 F. Supp. 2d 456.

155. *Id.* at 463–79.

156. 688 F. Supp. 2d at 598.

157. *Id.* at 620.

158. The Second and Fifth Circuits differ on whether an adverse inference instruction should be imposed as a sanction for the negligent spoliation of evidence. Compare *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."), with *Vick v. Tex. Emp't Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975) ("Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.").

officers.¹⁵⁹ The Lancer Management Group (“Lancer”) managed the Lancer Funds along with Lancer’s principal, Michael Lauer (“Lauer”). The plaintiffs alleged that they lost nearly all of the \$580 million they invested in the Lancer Funds between 1997 and 2002 on account of a fraudulent scheme known as “marking the close.”¹⁶⁰ The scheme involved the initial purchase for the Lancer Funds of large stakes in thinly-traded stocks¹⁶¹ followed by purchases of additional shares of those stocks shortly before the end of the Lancer Funds’ reporting periods at significantly higher prices.¹⁶² Purchasing the additional shares at the end of the reporting periods would artificially raise the closing prices of the stocks to enable the Lancer Funds to report artificially high net asset values and generate large fees for Lancer and Lauer.

The case was filed in the Southern District of Florida on February 12, 2004. It was transferred to the Southern District of New York on October 25, 2005,¹⁶³ where it was assigned to Judge Scheindlin. The defendants filed motions to dismiss the complaint in June 2004, and this resulted in the issuance of a stay of discovery pursuant to the Private Securities Litigation Reform Act¹⁶⁴ that lasted until February 2007. The defendants made their first discovery requests in May 2007 and began taking depositions of the plaintiffs on August 30, 2007.

In response to the defendants’ dissatisfaction with the plaintiffs’ document production efforts, the court ordered thirteen of the plaintiffs¹⁶⁵ to submit declarations regarding their efforts to preserve and produce documents. Plaintiffs’ counsel spent 910 hours questioning the plaintiffs’ employees, searching for documents, and drafting the declarations, which they submitted in the first half of 2008. The declarations described the steps the plaintiffs took to locate and preserve documents relating to the Lancer Funds when they retained counsel in late 2003 or early 2004, and most of the declarations discussed the plaintiffs’ compliance with a second search request in late 2007 or early 2008. The declarants all stated that they believed their companies had located, preserved, and produced all the

159. 685 F. Supp. 2d at 462 & n.3.

160. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 171–72 (S.D.N.Y. 2006).

161. Thinly traded stocks are shares that usually have few buyers and sellers and therefore are subject to wide swings in price when large purchases or sales are made. *See United States v. Hughes*, 505 F.3d 578, 583 n.5 (6th Cir. 2007).

162. 446 F. Supp. 2d at 172.

163. *Pension Comm.*, 685 F. Supp. 2d at 473.

164. *See generally* 15 U.S.C. §§ 77z-1(b)(1); 78u-4(b)(3)(B). The Act provides that during the pendency of a stay of discovery, the parties are required to “treat all documents . . . in [their] custody or control . . . that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.” *Id.* §§ 77z-1(b)(2), 78u-4(b)(3)(C)(i).

165. *Pension Comm.*, 685 F. Supp. 2d at 462 n.3 (“Although there are ninety-six plaintiffs in this action, only thirteen are relevant for this motion.”).

documents relating to the Lancer Funds in their possession at the time of the 2003 and 2007 searches, and that the companies had not discarded or destroyed any of those documents after the specific dates set out in the declarations.

Nevertheless, the defendants were able to identify at least 311 documents that twelve of the thirteen plaintiffs should have produced but did not. The defendants also claimed that almost all of the declarations were false and misleading or, alternately, were executed by declarants who did not have personal knowledge of their contents.¹⁶⁶ The defendants sought a variety of sanctions against the plaintiffs for spoliation of evidence, including dismissal, various types of adverse inference instructions, and monetary sanctions.¹⁶⁷

The *Pension Committee* opinion began by defining various levels of culpability in the discovery context, then assigning different burdens of proof and sanctions depending on the particular level of culpability. Next Judge Scheindlin applied this analytic framework to the facts of the case. She also specified the adverse inference instruction that she was going to use with respect to the plaintiffs that she found were grossly negligent.

Drawing an analogy from the law of torts, Judge Scheindlin defined the levels of culpability in the context of discovery misconduct as negligence, gross negligence, and willfulness. While allowing that these terms describe a continuum,¹⁶⁸ she assigned specific boundaries based on “standards [that] have been set by years of judicial decisions analyzing allegations of misconduct and reaching a determination as to what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding.”¹⁶⁹ Nevertheless, Judge Scheindlin recognized that determining the level of culpability for discovery misconduct was a judgment call that could not be done precisely, and that different judges might determine the level of culpability differently.

Judge Scheindlin categorized “[a] failure to preserve evidence resulting in the loss or destruction of relevant information” as negligence in the discovery context.¹⁷⁰ She noted that negligence could also arise from a failure to collect evidence or sloppy review of evidence that resulted in the loss or destruction of evidence.¹⁷¹ She also gave the following additional examples of negligence in the discovery context: failure to obtain records of any

166. *Id.* at 473–74.

167. *Id.* at 469–71.

168. *See id.* at 469–71.

169. *Id.* at 464.

170. *Id.* (“A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful.”).

171. *Id.* at 465 (“Once again, depending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful.”).

employees who were involved with the issues that were raised in the litigation or anticipated litigation; failure to take all appropriate measures to preserve electronically stored information; and failure to assess the accuracy and validity of selected search terms.¹⁷²

Referring to her prior opinions in *Zubulake*,¹⁷³ Judge Scheindlin stated that “the failure to issue a *written* litigation hold [after the duty to preserve evidence has attached] constitutes gross negligence because that failure is likely to result in the destruction of relevant information.”¹⁷⁴ She also indicated that the following examples of conduct after the duty to preserve evidence has attached constituted gross negligence: failure to collect records from key players; deletion of email; failure to preserve backup tapes if they were the only sources of relevant information or if they related to key players and the information from those players is no longer readily accessible; and failure to collect information from files of former employees that remained in a party’s possession, custody, or control.¹⁷⁵

Lastly, Judge Scheindlin classified “the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached” as willful misconduct.¹⁷⁶ She said that willful misconduct could also include the failure to collect records from key players as well as the destruction of email or certain backup tapes after the duty to preserve attached.¹⁷⁷

Judge Scheindlin then explained that a court should impose the least harsh of the sanctions that were warranted as a remedy for discovery misconduct.¹⁷⁸ She decided that the most extreme sanction of dismissal or a default judgment, which would terminate the case, was justified only for the most egregious types of misconduct, such as perjury, tampering with evidence, or burning, shredding, or wiping out computer hard drives to intentionally destroy evidence.¹⁷⁹

Judge Scheindlin reasoned that the next level of sanctions for spoliation of evidence would be some form of an adverse inference instruction with its harshness calibrated to the egregiousness of the spoliator’s conduct.¹⁸⁰ She said that the harshest form of instruction would be for willful or bad faith misconduct, and it would direct the jury that certain facts were deemed admitted and accepted as true. The next harshest form would be for willful or

172. *Id.*

173. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003).

174. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 471.

175. *Id.*

176. *Id.* at 464.

177. *Id.* at 465.

178. *Id.* at 470.

179. *Id.* at 469.

180. *Id.* at 470.

reckless misconduct, and it would be a mandatory presumption that would be rebuttable. The least harsh form would permit, but not require, the jury to presume that the missing evidence was both relevant and unfavorable to the spoliating party. The instruction would also state that if the jury made this presumption, the jury should then consider rebuttal evidence from the spoliating party and finally decide whether to draw an adverse inference against the party.¹⁸¹

Judge Scheindlin also discussed which party should bear the burden of proof with respect to spoliated evidence and the relationship of the burden of proof to sanctions. She determined that for the most severe sanctions of dismissal, preclusion, and adverse inference instructions, the court must consider not only the conduct of the spoliating party, but also the relevance of the missing evidence and whether the innocent party suffered prejudice as a result of the spoliation.

Judge Scheindlin declared that if the spoliating party acted in bad faith or with gross negligence, relevance and prejudice may be presumed. On the other hand, if the spoliating party was only negligent, the innocent party would have the burden of proving both relevance and prejudice for the court to impose a severe sanction, such as an adverse inference instruction, on the spoliating party.¹⁸² Finally, Judge Scheindlin ruled that “[w]hen the spoliating party’s conduct is sufficiently egregious to justify a court’s *imposition* of a presumption of relevance and prejudice, or when the spoliating party’s conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption.”¹⁸³ If the spoliating party was able to rebut the presumption of prejudice by showing that the innocent party had access to the missing evidence that was allegedly destroyed, or the evidence would not support the innocent party’s claims or defenses, no jury instruction would be warranted, but the court could still impose a monetary sanction.¹⁸⁴

After announcing these principles, Judge Scheindlin proceeded to apply them to the complex facts of her case. She began by determining the date when plaintiffs’ duty to preserve evidence first arose. Although the case was originally filed in Florida on February 12, 2004,¹⁸⁵ she decided that the plaintiffs’ duty to preserve evidence arose nearly a year earlier in April 2003.¹⁸⁶ Two of the plaintiffs had retained counsel in March 2003 on account of the collapse of the Lancer Funds,¹⁸⁷ one of the plaintiffs filed a complaint with the Financial Services Commission of the British Virgin

181. *Id.* at 470–71.

182. *Id.* at 467–68.

183. *Id.* at 468–69.

184. *Id.* at 469.

185. *Id.* at 473.

186. *Id.* at 475.

187. *See id.* at 472 n.57.

Islands on March 23, 2003,¹⁸⁸ and Lancer filed for bankruptcy on April 16, 2003.¹⁸⁹ The court reasoned that because the plaintiffs were all sophisticated investors, they should have reasonably anticipated litigation when these events occurred and begun to preserve evidence.¹⁹⁰

Judge Scheindlin next recounted the actions that the plaintiffs took to preserve evidence after April 2003. The plaintiffs retained their counsel in October or November 2003. Soon afterwards, plaintiffs' counsel contacted plaintiffs by telephone and email instructing them to begin document collection and preservation. Judge Scheindlin ruled that the instruction from plaintiffs' counsel did not satisfy the standard for a litigation hold, though, because it did not direct the plaintiffs' employees to preserve all relevant documents and counsel did not properly monitor the preservation of documents.¹⁹¹ The plaintiffs did not issue a written litigation hold until 2007.¹⁹²

By cross-referencing documents they obtained from the plaintiffs and other sources, the defendants were able to identify 311 documents that the plaintiffs should have produced in discovery but did not. Most of these documents were created after April 2003, when the duty to preserve arose, but some were created before then. It was not clear when the 311 documents had been destroyed. Documents that were created before April 2003 might not have been in the plaintiffs' possession, custody, or control when the duty to preserve arose in April 2003. Documents created after April 2003 surely were destroyed after the duty to preserve arose, however.¹⁹³

Judge Scheindlin concluded that it was likely that most of these documents had been destroyed before the case was transferred from the Southern District of Florida to the Southern District of New York in 2005 because of the plaintiffs' failure to institute a written litigation hold.¹⁹⁴ She noted that while the Southern District of New York had established a written litigation hold requirement in 2004, the Southern District of Florida did not adopt a written litigation hold requirement until 2007.¹⁹⁵ Judge Scheindlin ruled that if the defendants had been able to prove that the plaintiffs had destroyed any of the documents after the case had been transferred to the Southern District of New York in 2005, dismissal of the action would have been justified, but they had not done so.¹⁹⁶

Judge Scheindlin decided that none of the plaintiffs had engaged in willful discovery misconduct, and that their conduct before the case was transferred to the Southern District of New York in 2005 was best character-

188. *Id.*

189. *Id.* at 462.

190. *Id.* at 475.

191. *See id.* at 473.

192. *See id.* at 474.

193. *See id.* at 476.

194. *Id.* at 476–77.

195. *Id.* at 477 & n.90.

196. *See id.* at 476–77.

ized as either grossly negligent or negligent.¹⁹⁷ She described a wide variety of discovery misconduct for the thirteen plaintiffs. It included conducting severely deficient searches; deleting electronic documents; destroying back-up tapes that potentially contained documents of key players that were not otherwise available; failing to collect and preserve documents of key players; delegating search efforts without supervision from management; delayed production of documents; submitting misleading or inaccurate declarations to the court concerning their efforts to preserve and produce documents; failing to search a personal digital assistant (“PDA”); and failing to search backup tapes for relevant material that was not produced and either was shown to have existed or should have existed.¹⁹⁸ Judge Scheindlin concluded that the misconduct of six of the thirteen plaintiffs fit within the standard for gross negligence, while the others were only negligent.¹⁹⁹

The sanctions that Judge Scheindlin imposed on the plaintiffs turned on whether she found them grossly negligent or negligent. Even though the defendants were able to identify 311 documents that the plaintiffs had not produced, Judge Scheindlin ruled that the defendants were not prejudiced by the plaintiffs’ failure to produce those documents because the defendants had obtained them from other sources.²⁰⁰ Judge Scheindlin also ruled that there must have been other documents besides the 311 documents the defendants had obtained from other sources that the plaintiffs had not produced.²⁰¹

Judge Scheindlin acknowledged that it was impossible to know the number or substance of the documents that she ruled had been lost or destroyed, and therefore there was no way to determine whether the lost or destroyed documents would have been favorable to the defendants.²⁰² Nevertheless, she concluded that the defendants had satisfied their limited burden of proving that the lost or destroyed documents would have been relevant²⁰³ because they had been created during the critical time period²⁰⁴

197. *Id.* at 477–78. In addition, because the duty to issue a written litigation hold was not clearly established in the Southern District of Florida in early 2004, a failure to issue a written litigation hold was not sufficient by itself to find gross negligence. *Id.* at 488.

198. *Id.* at 479, 484, 491–92.

199. *Id.* at 479–96.

200. *Id.* at 478 (“While many of [the 311] documents may be relevant, the Citco Defendants suffered no prejudice because all were eventually obtained from other sources.”), 480 (“I find that no reasonable juror could conclude that the Citco Defendants were prejudiced by plaintiffs’ failure to produce the 311 Documents.”).

201. *Id.* at 476.

202. *Id.* at 478 (“[The lost or destroyed] documents may have been helpful to the Citco Defendants, helpful to plaintiffs, or of no value to any party.”).

203. *Id.* at 479 (“There can be no serious question that the missing material would have been relevant.”).

204. *Id.* at 479. Judge Scheindlin did not specify what the critical time period was or explain why she concluded that the lost documents were created during that period. The plaintiffs’ investments were made between 1997 and 2002. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 446 F. Supp. 2d 163, 171 (S.D.N.Y.

and there must have been correspondence with the plaintiffs regarding the relevant transactions.²⁰⁵

Judge Scheindlin's ruling with respect to prejudice differed from her ruling with respect to relevance, however. She decided that the defendants had not necessarily satisfied their burden of proving they were prejudiced by the loss of the documents, particularly since the defendants had managed to gather an enormous amount of other evidence.²⁰⁶ With respect to the negligent plaintiffs, she decided that a lesser sanction would be sufficient unless the defendants showed, through extrinsic evidence, that the loss of the documents had prejudiced their defense.

With respect to the grossly negligent plaintiffs however, Judge Scheindlin ruled that the defendants were entitled to a presumption that they were prejudiced by the loss of the unknown number of documents. She therefore decided that the jury would receive a spoliation instruction that would permit the jury to presume, if it so chose, that the lost or destroyed documents were both relevant and prejudicial. She also ruled that the presumption with respect to the grossly negligent plaintiffs would be rebuttable. In addition, she imposed monetary sanctions on all the plaintiffs, including reasonable attorneys fees for the defendants' bringing the motion for sanctions, reviewing the declarations submitted by the plaintiffs, and taking depositions of the declarants. The opinion concluded with the following spoliation jury instruction:

The Citco Defendants have argued that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation destroyed relevant evidence, or failed to prevent the destruction of relevant evidence. This is known as the "spoliation of evidence."

Spoliation is the destruction of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. To demonstrate that spoliation occurred, the Citco Defendants bear the burden of proving the following two elements by a preponderance of the evidence:

First, that relevant evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue

2006). Their losses occurred between March 2000, when the Lancer Funds began losing money, and July 2003, when they were placed into receivership. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608, 616–17 (S.D.N.Y. 2009). Thus, the critical time period may have been from 1997 until July 2003. There is no indication when the lost documents were created in any of the published opinions in the case.

205. *Pension Comm.*, 685 F. Supp. 2d at 479.

206. *Id.*

in the trial and otherwise would naturally have been introduced into evidence; and

Second, that if relevant evidence was destroyed after the duty to preserve arose, the evidence lost would have been favorable to the Citco Defendants.

I instruct you, as a matter of law, that each of these plaintiffs failed to preserve evidence after its duty to preserve arose. This failure resulted from their gross negligence in performing their discovery obligations. As a result, you may presume, if you so choose, that such lost evidence was relevant, and that it would have been favorable to the Citco Defendants. In deciding whether to adopt this presumption, you may take into account the egregiousness of the plaintiffs' conduct in failing to preserve the evidence.

However, each of these plaintiffs has offered evidence that (1) no evidence was lost; (2) if evidence was lost, it was not relevant; and (3) if evidence was lost and it was relevant, it would not have been favorable to the Citco Defendants.

If you decline to presume that the lost evidence was relevant or would have been favorable to the Citco Defendants, then your consideration of the lost evidence is at an end, and you will not draw any inference arising from the lost evidence.

However, if you decide to presume that the lost evidence was relevant and would have been favorable to the Citco Defendants, you must next decide whether any of the following plaintiffs have rebutted that presumption: 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, or the Bombardier Foundation. If you determine that a plaintiff has rebutted the presumption that the lost evidence was either relevant or favorable to the Citco Defendants, you will not draw any inference arising from the lost evidence against that plaintiff. If, on the other hand, you determine that a plaintiff has not rebutted the presumption that the lost evidence was both relevant and favorable to the Citco Defendants, you may draw an inference against that plaintiff and in favor of the Citco Defendants—namely that the lost evidence would have been favorable to the Citco Defendants.

Each plaintiff is entitled to your separate consideration. The question as to whether the Citco Defendants have proven spoliation is personal to each plaintiff and must be decided by you as to each plaintiff individually.²⁰⁷

207. *Id.* at 496–97.

There are a number of problems with this jury instruction. First, the instruction would surely be confusing to a jury. After defining spoliation and setting out the defendants' burden of proof with respect to its two elements, the instruction states that the jury may presume that the lost evidence was relevant and favorable to the defendants, but it does not explain what is meant by the word "presume."²⁰⁸ One possible interpretation of the instruction would be that the jury may infer that the lost evidence was relevant and favorable to the defendants. However, later parts of the jury instruction state that the jury should not draw inferences from the lost evidence if it declines to presume that the lost evidence was relevant and favorable to the defendants, which suggests a distinction between a presumption and an inference.²⁰⁹ In addition, interpreting "presume" to mean "infer" is inconsistent with the definition of a presumption in Federal Rule of Evidence 301. Rule 301 provides that a presumption in civil actions shifts the burden of producing evidence but not the burden of persuasion.²¹⁰

If the jury instruction is interpreted as using "presume" as provided in Rule 301, then it would mean that the plaintiffs would have the burden of producing evidence to rebut the presumption that the lost evidence was relevant and favorable to the defendants, but they would not have the burden of persuasion on this issue. This interpretation is supported by the later statements in the jury instruction regarding the jury's determination of whether the plaintiffs have rebutted the presumption. According to one part of the instruction, the jury should not draw any inference arising from the lost evidence if the jury determines that the plaintiffs have rebutted the presumption.²¹¹ But this interpretation of the jury instruction is in conflict with parts of the instruction that expressly state that each plaintiff has produced evidence that no evidence was lost, and if any evidence was lost, it was neither relevant nor favorable to the defendants.²¹² Because the jury instruction states that each plaintiff has produced evidence that rebuts the presumption, the effect of the presumption would vanish under the "bursting bubble" theory of Rule 301. The jury instruction would be unnecessary because the defendants failed to show that the lost evidence was relevant and favorable to the defendants.

A third interpretation of the jury instruction is that the effect of the presumption is to shift the burden of persuasion with respect to whether the lost

208. *Id.* at 496.

209. *Id.* at 497.

210. FED. R. EVID. 301 provides:

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

211. *Pension Comm.*, 685 F. Supp. 2d at 497.

212. *Id.*

evidence was relevant and favorable to the defendants from the defendants, who would normally carry the burden under Rule 301, to the plaintiffs. This interpretation is consistent with later portions of the instruction that direct the jury to draw an inference from the lost evidence only if the plaintiff has not rebutted the presumption.²¹³ Clearly, this interpretation is inconsistent with Rule 301, though, which provides that a presumption does not shift the burden of persuasion. Surely if the jury instruction in *Pension Committee* is confusing to a reader of this Article, it would be confusing to a jury.

The jury instruction is also contradictory. One paragraph states that, as a matter of law, each of the plaintiffs failed to preserve evidence after the duty to preserve evidence arose.²¹⁴ In the following paragraph, however, the instruction states that each of the plaintiffs has offered evidence that no evidence was lost.²¹⁵ It is not clear whether the jury should consider the plaintiffs' evidence that no evidence was lost because the court has already determined as a matter of law that the plaintiffs failed to preserve evidence.

The jury instruction adds that the plaintiffs' failure to preserve evidence resulted from their gross negligence in performing their discovery obligations.²¹⁶ However, the instruction does not explain the significance of the court's finding that the plaintiffs were grossly negligent or how this finding relates to any of the issues that the jury is to decide. It is also not apparent why the court would instruct the jury that the plaintiffs were grossly negligent. Without any explanation, the court's finding may be unfairly prejudicial to the plaintiffs because the jury may conclude that the court's finding of gross negligence negated an element of the plaintiffs' claims.

More importantly, the jury instruction does not describe the nature of the evidence that the plaintiffs failed to preserve and what its relationship to the issues in the case may have been. In order for the jury to decide whether the lost evidence was relevant and favorable to the defendants, the jury would need to be informed about its general nature.²¹⁷ After all the legal terminology and contradictions, it is unlikely that the jury would be able to understand what evidence was supposed to have been destroyed and what inference it should draw if it decided that the evidence had been destroyed.

In contrast, the jury instruction in *Zubulake* described the evidence the defendant failed to produce as "e-mails sent or received by UBS personnel in August and September 2001."²¹⁸ Although it was impossible to know the precise content of the lost evidence in *Zubulake*, the jury instruction did specify the nature of the lost evidence, and its relationship to the issues in the case was apparent. *Zubulake* was an employment discrimination case

213. *Id.*

214. *Id.* at 496.

215. *Id.* at 497.

216. *Id.* at 496.

217. See *supra* text accompanying notes 47–48.

218. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 439 (S.D.N.Y. 2004).

brought by a plaintiff who filed her charge with the EEOC on August 16, 2001, and was fired on October 9, 2001, with two weeks' notice.²¹⁹ The defendant's duty to preserve evidence began in April 2001 when litigation was reasonably anticipated²²⁰ and it was clear that the emails the defendants failed to produce had been destroyed after the duty to preserve them arose. The plaintiff could offer examples of emails sent and received in August and September 2001 by UBS personnel that were relevant to the plaintiff's claims, and it was reasonable to expect that there were other emails from that time period that UBS personnel had intentionally destroyed that also would have been relevant.

In contrast, the *Pension Committee* jury instruction did not identify even generally the type of evidence the plaintiffs failed to preserve. Moreover, there does not appear to be any relationship between the issues in the case and the evidence the plaintiffs failed to preserve. Even if a party failed to conform to acceptable standards for the preservation of electronic documents by issuing a written litigation hold when the duty to preserve evidence arose, and even if the party's failure caused electronic documents to be destroyed, there is not a basis for sanctions unless the destroyed electronic documents were relevant or at least would reasonably lead to the discovery of admissible evidence.²²¹

Judge Scheindlin's only explanation of the relevance of the documents that the plaintiffs failed to preserve was as follows:

All plaintiffs had a fiduciary duty to conduct due diligence before making significant investments in the Funds. Surely records must have existed documenting the due diligence, investments, and subsequent monitoring of these investments. The paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexo-

219. *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 312 (S.D.N.Y. 2003).

220. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

221. See *Steuben Foods v. Country Gourmet Foods, LLC*, No. 08-CV-561S(F), 2011 WL 1549450, at *3 (W.D.N.Y. Apr. 21, 2011) ("[P]arties seeking spoliation sanctions must establish the destroyed evidence was relevant in that the lost evidence would allow a reasonable jury to find the evidence probative of the party's claims."); *Orbit One Commc'ns v. Numerex*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010) ("Rather than declaring that the failure to adopt good preservation practices is categorically sanctionable, the better approach is to consider such conduct as one factor . . . and consider the imposition of sanctions only if some discovery-relevant data has been destroyed." (internal citation omitted)); *Pension Comm.*, 685 F. Supp. 2d at 468 ("If a presumption of relevance and prejudice were awarded to every party who can show that an adversary failed to produce any document, even if such failure is completely inadvertent, the incentive to find such error and capitalize on it would be overwhelming. This would not be a good thing."); PAUL R. RICE, ELECTRONIC EVIDENCE 122 (2nd ed. 2008) ("[T]here is no spoliation if the evidence destroyed was not relevant to the issues being litigated. There must be some showing that there is a nexus between the proposed inference and the information contained in the lost evidence.").

rably to the conclusion that relevant records have been lost or destroyed.²²²

Pension Committee involved claims for federal securities and common law fraud arising out of investments in hedge funds between 1997 and 2002.²²³ The elements of a securities fraud claim are: (1) the making of a material misrepresentation or omission, (2) scienter, (3) a connection with the purchase or sale of a security, (4) reliance, (5) economic loss, and (6) causation.²²⁴ Evidence relating to most of these elements would have been in the defendants' possession because these elements concern the defendants' misrepresentations and scienter. The main exception would be evidence of the plaintiffs' reliance on the defendants' misrepresentations, but evidence relating to the plaintiffs' reliance would probably have been generated during the period between 1997 and 2002 when the plaintiffs were making their investments rather than after their investments had been lost.

Even if there had been electronically stored information relating to reliance that was created during the period the plaintiffs were making investments in the defendants' hedge funds, the plaintiffs were not obligated to preserve it before April 2003 when their duty to preserve evidence arose.²²⁵ Consequently, no adverse inference should have arisen from the loss of the electronically stored information unless it had been lost or destroyed after April 2003.

The *Pension Committee* decision stated that most of the 311 documents that the plaintiffs had not produced but the defendants obtained from other sources were created after April 2003.²²⁶ Documents created after April 2003 would not likely be probative of reliance or any other issues in the case because they would have been created long after the plaintiffs made their investments in the hedge funds and long after the defendants made their alleged misstatements or omissions. Although the decision noted that some documents had been created before 2002²²⁷ and the plaintiffs failed to preserve some evidence after April 2003,²²⁸ the decision does not provide any examples of documents that both were created before 2002 and were lost or destroyed after April 2003. Thus, there was no showing that any

222. *Pension Comm.*, 685 F. Supp. 2d at 476.

223. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 170–71 (S.D.N.Y. 2006).

224. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

225. *Pension Comm.*, 685 F. Supp. 2d at 476.

226. *Id.*

227. The defendants identified fifty-seven emails that William Hunnicutt sent between February 3, 1999, and May 14, 2003, that he failed to produce. He also stated in a declaration that he recalled accidentally deleting his email "sent" file prior to March 13, 2003. *Id.*

228. For example, William Hunnicutt, the President of one of the plaintiffs, testified that he had a practice of deleting emails unless he felt there was an important reason to keep them, and he continued to delete emails after 2003. *Id.* at 482.

relevant documents were lost or destroyed by the plaintiffs after the duty to preserve arose.

The use of an adverse inference instruction in *Pension Committee* is particularly troubling because the plaintiffs did not purposefully destroy evidence or engage in willful misconduct.²²⁹ Unlike most other circuits,²³⁰ the Second Circuit has held that an adverse inference may be appropriate for negligent spoliation in some circumstances.²³¹ As a matter of logic, a spoliator's destruction of evidence may support an inference that the spoliated evidence would have been unfavorable to the spoliator only if the spoliator intended to destroy the evidence and had notice that the evidence was relevant to pending or anticipated litigation.²³² Consequently, the circumstantial link between the spoliation and the adverse inference is broken when the spoliation is not intentional.²³³

In *Pension Committee*, Judge Scheindlin ruled that there was no willful misconduct. In addition, the documents that were lost or destroyed either did not appear to be relevant or else appeared to have been destroyed before the duty to preserve arose. Thus, it is difficult to see how their loss or destruction would have supported an inference that they were unfavorable to the plaintiffs, even though the court determined that the plaintiffs had been grossly negligent in failing to preserve them.

B. Rimkus Consulting Group, Inc. v. Cammarata

*Rimkus Consulting Group, Inc. v. Cammarata*²³⁴ differs substantially from *Pension Committee*. *Rimkus* arose out of the departure of several employees to form a new company and compete with their former employer, the Rimkus Consulting Group. Three of the employees, Gary Bell, Nickie G. Cammarata, and Michael H. DeHarde, filed an action for declaratory relief against Rimkus in a Louisiana state court on November 15, 2006, which was the same day that Cammarata resigned from Rimkus and the new company began operations.²³⁵ In this action, the employees sought a declaratory judgment that the non-competition and non-solicitation provisions in their employment and stock purchase agreements were unenforceable.

229. *Id.* at 463, 478.

230. For summaries of the precedents in the various circuits, see *United States v. Laurent*, 607 F.3d 895, 902 n.5 (1st Cir. 2010); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614–16 & nn.10–13 (S.D. Tex. 2010).

231. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002).

232. See *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998); *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982); MCCORMICK, *supra* note 54; Dropkin, *supra* note 48; Maguire & Vincent, *supra* note 57, at 235.

233. See Dropkin, *supra* note 48, at 1826.

234. 688 F. Supp. 2d 598 (S.D. Tex. 2010).

235. *Id.* at 608, 622–23.

Rimkus filed a “reconventional demand” which, in Louisiana civil procedure, is similar to a counterclaim in federal civil procedure.²³⁶ The reconventional demand asserted causes of action against the employees for breach of the provisions in the employment and stock purchase agreements, breach of fiduciary duty, and disparagement. The employees eventually prevailed in the Louisiana action in 2008 with the Louisiana Fifth Circuit Court of Appeal ruling that the non-competition and non-solicitation provisions in the employment agreements were invalid and unenforceable.²³⁷ The Louisiana trial court also granted summary judgment in favor of the employees on Rimkus’s reconventional demands against the employees.²³⁸

In January and February 2007, Rimkus filed separate suits against Cammarata and Bell in federal court in Texas and the two suits were consolidated before Judge Rosenthal.²³⁹ Rimkus alleged in the consolidated federal action that Cammarata and Bell breached the non-competition and non-solicitation provisions in their employment agreements. Rimkus also accused them of using Rimkus’s trade secrets and proprietary information in setting up and operating their new company.²⁴⁰ In addition, Rimkus alleged that Bell breached his fiduciary duty to Rimkus by preparing to form the new company before he resigned from Rimkus.

In the federal action, Rimkus sought the production of documents, including emails, relating to communications between Cammarata, Bell, and other members of the new company that concerned the formation of the new company, their roles in the new company, and their contacts with clients. These documents related directly to Rimkus’s claims that the defendants breached the non-competition and non-solicitation provisions in their employment agreements. Judge Rosenthal determined that the defendants’ duty to preserve evidence arose no later than November 11, 2006, when Bell sent an email to Cammarata and two others. That email discussed plans to file the declaratory relief action against Rimkus in Louisiana state court.²⁴¹

Rimkus moved for spoliation sanctions against Cammarata and Bell including a default judgment, an adverse inference instruction, and monetary sanctions.²⁴² Judge Rosenthal ruled that Rimkus had presented evidence that the defendants, acting in bad faith and after the duty to preserve evidence arose, had deleted or destroyed emails that were relevant to Rimkus’s claims for the purpose of making the emails unavailable in the Louisiana and federal court actions. These emails concerned the setting up and operation of

236. *Id.* at 629 n.27; LA. CODE CIV. P. ANN., art. 1061 (2005) (providing for permissive and compulsory reconventional demands by defendants against plaintiffs).

237. *Rimkus*, 688 F. Supp. 2d at 626–28; *Bell v. Rimkus Consulting Grp., Inc. of La.*, 983 So.2d 927, 934 (La. Ct. App. 2008).

238. *Rimkus*, 688 F. Supp. 2d at 629.

239. *Id.* at 608.

240. *Id.*

241. *Id.* at 623–24, 641.

242. *Id.* at 609.

the new company, obtaining information from Rimkus and using it for the new company's benefit, and the solicitation of Rimkus clients.²⁴³

She also ruled that Rimkus had been able to obtain copies of numerous deleted emails from other sources such as Internet service providers and email providers.²⁴⁴ Thus, even though there were likely deleted emails that Rimkus would never be able to recover, Rimkus still had extensive evidence to prove its case. In addition, Judge Rosenthal found that some of the emails the defendants had deleted but were later recovered would probably be helpful to their defense. She concluded that ordering a default judgment as a sanction for the spoliation would not be appropriate because the spoliation had not resulted in irreparable prejudice to Rimkus.²⁴⁵

Judge Rosenthal ruled that an adverse inference instruction would be appropriate, however, in order to level the evidentiary playing field.²⁴⁶ She said that she would instruct the jury that in and after November 2006, the defendants had a duty to preserve emails and other information they knew would be relevant to anticipated litigation. If the jury decided the defendants had deleted emails to prevent their use in the litigation, the jury would be permitted, but was not required, to infer that the emails would have been unfavorable to the defendants. Finally, the jury would be instructed that it should consider the defendant's conduct as well as other evidence in determining the content of the deleted emails.²⁴⁷ Judge Rosenthal also imposed monetary sanctions against the defendants for the reasonable costs and attorneys' fees that Rimkus required to identify and respond to the spoliation.²⁴⁸

In contrast to Judge Scheindlin's adverse inference instruction in *Pension Committee*,²⁴⁹ Judge Rosenthal's adverse inference instruction was framed in terms of an inference rather than a presumption. There was no need to consider the shifting of the burden of proof with respect to the relevance and prejudice of the lost evidence. Judge Rosenthal explained that it was sufficient to present the jury with the ultimate issue of whether to draw the adverse inference instead of instructing the jury on the rebuttable presumption steps.²⁵⁰ She also noted that this approach was in line with the approach the federal courts had used in other contexts that involve a judicial analysis of burden-shifting followed by a jury instruction on ultimate questions.²⁵¹

243. *Id.* at 644.

244. *Id.* at 633, 644.

245. *Id.* at 644–45.

246. *Id.* at 645.

247. *Id.* at 646–47.

248. *Id.* at 647.

249. *See supra* text accompanying note 207.

250. *Rimkus*, 688 F. Supp. 2d at 646–47.

251. *Id.* at 620 n.21 (citing *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992)); *see also*

Judge Rosenthal's approach of framing the adverse inference instruction in terms of an inference is preferable to Judge Scheindlin's use of presumptions in the jury instruction because it is faithful to Federal Rule of Evidence 301. It is also less likely to confuse a jury. As the Fifth Circuit noted in *Walther v. Lone Star Gas Co.*: "Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question" ²⁵²

Under Federal Rule of Evidence 301, the effect of a presumption disappears once evidence is offered to rebut the presumption. In both *Pension Committee* and *Rimkus*, the spoliators offered evidence to rebut the presumption that the lost evidence was relevant and unfavorable to the spoliator. In *Pension Committee*, Judge Scheindlin emphasized that the plaintiffs had offered rebuttal evidence in her jury instruction.²⁵³ In *Rimkus*, the defendants contended that any emails or documents they destroyed that could not be obtained from other sources were merely cumulative of other evidence that Rimkus already had.²⁵⁴ Judge Rosenthal also pointed out that some of the emails that the defendants deleted but were later recovered were not unfavorable to the defendants.²⁵⁵ Spoliators are likely to offer rebuttal evidence in other cases, and if they do, it is not proper under Federal Rule of Evidence 301 to give any jury instruction on the presumption.

Under Federal Rule of Evidence 301, a conditional jury instruction concerning the shifting burden of proof for a presumption is required only when there is a jury question concerning whether evidence has been lost or destroyed and the spoliator fails to offer any evidence rebutting the presumption that the lost evidence was relevant and unfavorable to the spoliator.²⁵⁶ In these circumstances, the jury should be instructed that if it decides that evidence was lost or destroyed, it must find that the lost evidence was relevant and unfavorable to the spoliator.

It is not necessary to frame the adverse inference for spoliation as a presumption. In fact, framing it as an adverse inference is preferable. The benefit of a presumption is to "smoke out" proof by putting pressure on the presumed-against party to come forward with some evidence to rebut the presumption in order to avoid summary judgment or judgment as a matter of law.²⁵⁷ In the context of spoliation of evidence, this benefit is not very

Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (affirming trial judge's refusal to give instruction on the shifting burdens in an employment discrimination case).

252. *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992).

253. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 497 (S.D.N.Y. 2010).

254. 688 F. Supp. 2d at 641.

255. *Id.* at 646.

256. *See supra* text accompanying note 140.

257. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11 (1993) ("The presumption, having fulfilled its role of forcing the defendant to come forward with some response,

significant. The adverse inference from spoliation would provide a spoliator with motivation to contest the inference. Spoliators do not need to be “smoked out” so long as they are motivated to emerge by other means. Therefore, little is gained by framing the adverse inference as a presumption. Framing the adverse inference as an inference instead of a presumption eliminates the need to give a mandatory jury instruction in the rare cases where the spoliator did not offer evidence to rebut the presumption.

The sanctions of an adverse inference instruction and the award of reasonable costs and attorneys’ fees were not the only consequences of the spoliation in *Rimkus*. In the federal action, the defendants moved for summary judgment on account of the judgment in their favor in the declaratory relief action they had filed in the Louisiana state court.²⁵⁸ The defendants argued that the claims in the federal action were precluded by the holdings of the Louisiana Court of Appeal, which ruled that the non-competition and non-solicitation provisions in the defendants’ employment and stock purchase agreements were invalid and unenforceable.²⁵⁹ The defendants also argued that the trial court’s summary judgment should have preclusive effect with respect to the causes of action for misappropriation of trade secrets or confidential information, breach of fiduciary duty, and disparagement in the reconventional demand.²⁶⁰

Judge Rosenthal acknowledged that the requirements for claim and issue preclusion under Louisiana law would normally have been satisfied by the Louisiana state court judgment and that her court was required to give full faith and credit to the Louisiana state court judgment.²⁶¹ She applied an exception²⁶² to the preclusive effect of the Louisiana state court judgment,

simply drops out of the picture.”); Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 255–56 (1981) (“Placing [the] burden of production on the defendant thus serves simultaneously to meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and to frame the factual issue with a sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.”); Louisell, *supra* note 113, at 301 (“The traditionalist view is that . . . the presumption affects only the burden of production, and that having ‘smoked out’ the opposition’s proof the presumption is spent and disappears.”).

258. *Rimkus*, 688 F. Supp. 2d at 610.

259. *Id.* at 627.

260. *Id.* at 646.

261. *Id.* at 654–63.

262. Judge Rosenthal also decided that the scope of the Louisiana state court’s ruling with respect to the claims for breach of the non-competition and non-solicitation provisions in the employment and stock purchase agreements was limited to the defendants’ activities in Louisiana. *Id.* at 659–60. She ruled that the Louisiana state court’s decision that the non-competition and non-solicitation provisions were invalid and unenforceable was based on Louisiana choice of law rules and Louisiana substantive law, and that the Louisiana state court had not determined whether these provisions were valid and enforceable under the Texas choice of law rules and Texas substantive law. *See Rimkus Consulting Grp., Inc. v. Cammarata*, 257 F.R.D. 127, 138 (S.D. Tex. 2009). Accordingly, the Louisiana state court’s decision that the non-competition and non-solicitation provisions were invalid and unenforceable did not apply to the defendants’ activities outside of Louisiana. *Id.* at 140–41. Judge Rosenthal decided that the Louisiana state court’s decision precluded relitigation of

however, for “exceptional circumstances”²⁶³ on account of the defendants’ spoliation of evidence.²⁶⁴ Judge Rosenthal reasoned that the defendants had prevented Rimkus from having a full and fair opportunity to litigate the claims for misappropriation, breach of fiduciary duty, and disparagement in the Louisiana action by deleting emails in bad faith and hiding material information from Rimkus.²⁶⁵

Judge Rosenthal also granted summary judgment dismissing the claims for disparagement, tortious interference, and damages for breach of the non-competition and non-solicitation provisions in the employment agreements on other grounds.²⁶⁶ However, she denied summary judgment with respect to the claims for misappropriation of trade secrets, breach of fiduciary duty to the extent it was based on misappropriation, unfair competition, and civil conspiracy.²⁶⁷

Judge Rosenthal’s ruling with respect to claim and issue preclusion surely had a greater impact on the litigation than the ruling with respect to sanctions. Had Judge Rosenthal applied claim and issue preclusion from the Louisiana state court actions, the federal action would have been dismissed without a trial.²⁶⁸ In contrast, her ruling on discovery sanctions did not dispose of any claims, and instead merely permitted the jury to make adverse inferences from the defendants’ spoliation of evidence.

Both *Pension Committee* and *Rimkus* involved spoliation of electronically stored information but they differed substantially in their facts, the applicable law, and the approaches of the two courts to fashioning remedies for the spoliation. The major differences between the two cases were the potential relevance of the spoliated evidence and the culpability of the spoliators. In *Pension Committee*, the spoliated evidence consisted of the plaintiffs’ emails. These emails did not appear to be material to the case, partly because their only possible relevance was to show the plaintiffs’ lack of reliance on the defendants’ misrepresentations and partly because the plaintiffs’ duty to preserve the emails did not arise until long after the

whether the non-competition and non-solicitation provisions were invalid and unenforceable with respect to the defendants’ activities inside Louisiana, however. *Id.* at 138, 141.

263. LA. REV. STAT. ANN. § 13:4232 (West 2006) provides in part: “A judgment does not bar another action by the plaintiff: (1) When exceptional circumstances justify relief from the res judicata effect of the judgment”

264. *Rimkus*, 688 F. Supp. 2d at 664 (“In the present case, weighing the policies underlying preclusion law against the evidence that the defendants spoliated evidence relevant to the misappropriation claims, this court concludes that exceptional circumstances exist such that preclusion does not apply to those claims.”).

265. *Id.* at 646, 659.

266. *Id.* at 670–76.

267. *Id.* at 679.

268. Although the Louisiana state court judgment would not have precluded the claim for breach of the non-competition and non-solicitation provisions of the employment agreements on account of the defendants’ activities outside of Louisiana, *see supra* note 262, Judge Rosenthal decided that this claim was barred by the substantive law of Texas. *Rimkus*, 688 F. Supp. 2d at 673–74.

defendants made the misrepresentations.²⁶⁹ As a consequence, the plaintiffs were unlikely to have been motivated to delete the emails for the purpose of preventing the defendants from obtaining them in discovery. Instead, Judge Scheindlin found that the plaintiffs in *Pension Committee* were either negligent or grossly negligent with respect to their duty to preserve evidence.

In contrast, the deleted emails in *Rimkus* were likely to have been directly related to the plaintiff's claims for breach of the non-competition and non-solicitation provisions, misappropriation of trade secrets and customer lists, and breach of fiduciary duty, because the emails would have been created contemporaneously with the defendants' alleged wrongful actions and after the defendants had a duty to preserve them.²⁷⁰ As a consequence, the defendants had a substantial motivation to prevent the plaintiff from obtaining the spoliated evidence in discovery. In addition, there was other circumstantial evidence that the defendants deleted the emails intentionally and in bad faith.²⁷¹ Because both the potential relevance of the spoliated evidence and the culpability of the spoliators were less in *Pension Committee* than in *Rimkus*, the inference that the spoliated evidence would have been unfavorable to the spoliators would likely be considerably weaker in *Pension Committee* than in *Rimkus*.

The applicable law also differed dramatically between *Pension Committee* and *Rimkus* because the Second Circuit allows the use of an adverse inference instruction for negligent or grossly negligent spoliation²⁷² while the Fifth Circuit requires bad faith for an adverse inference from spoliation.²⁷³ Since the plaintiffs in *Pension Committee* did not delete emails intentionally or in bad faith, an adverse inference instruction would not have been allowed if the case had been in the Fifth Circuit or perhaps any other circuit besides the Second Circuit.

Finally, the approaches that the two trial judges took in fashioning an adverse inference instruction differed significantly. Judge Scheindlin's approach was more aggressive. She said she would instruct the jury that as a matter of law the plaintiffs had failed to preserve evidence after the duty to preserve arose, and that the failure resulted from the plaintiffs' gross negligence in performing their discovery obligations. In addition, Judge Scheindlin's instruction would direct the jury that, as a result of the failure

269. See *supra* text accompanying notes 223–228.

270. *Rimkus*, 688 F. Supp. 2d at 641–42.

271. *Id.* at 644.

272. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2d Cir. 2002) (“[D]iscovery sanctions, including an adverse inference instruction, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence . . .”).

273. See *Vick v. Tex. Emp’t Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975) (“The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. ‘Moreover, the circumstances of the act must manifest bad faith.’”) (quoting *EDWARD W. CLEARY, MCCORMICK ON EVIDENCE* § 273 (2d ed. 1972)).

to preserve evidence, it may choose to presume that the lost evidence would have been relevant and favorable to the defendants. If the jury decided to presume the lost evidence was relevant and would have been favorable to the defendants, the jury must then determine whether each of the plaintiffs rebutted the presumption.

Ultimately, Judge Scheindlin's instruction hinged on whether the plaintiff rebutted the presumption. The jury would not draw any inference against the plaintiff from lost evidence if the plaintiff successfully rebutted the presumption. If the plaintiff was unsuccessful, the jury would be permitted to draw an inference that the lost evidence would have been favorable to the defendants.²⁷⁴

Judge Rosenthal's approach was more restrained in directing the jury with respect to the adverse inference from spoliation. Judge Rosenthal concluded that there was sufficient evidence for a reasonable jury to find that the defendants had intentionally destroyed potentially relevant evidence²⁷⁵ but she did not tell the jury that the defendants' conduct was intentional. She also declined to instruct the jury on the rebuttable presumption steps.²⁷⁶ Instead, she decided to allow the jury to hear the evidence about the defendants' spoliation. Then she instructed the jury on the defendants' duty to preserve evidence. If the jury found that the defendants deleted emails to prevent Rimkus from using the emails in the litigation, the jury could, but would not be required to, infer that the lost emails would have been unfavorable to the defendants.²⁷⁷ Ironically, Judge Rosenthal's adverse inference instruction is likely to have greater impact than Judge Scheindlin's instruction, not because of differences in the contents of the jury instructions, but because of the greater potential relevance of the spoliated evidence and greater culpability of the spoliators in *Rimkus* than in *Pension Committee*. The substance of the evidence thus matters.

The next section discusses an alternative approach that courts should consider using to deal with spoliation of evidence. Instead of imposing an adverse inference instruction as a sanction for spoliation, a court should allow any evidence of spoliation and discovery misconduct to be admitted to the extent that it is relevant, and then permit counsel to argue the inferences that the jury should draw from the evidence of spoliation.

IV. COURTS SHOULD RELY MORE ON ATTORNEY ADVOCACY

Spoliation of electronically stored information has become a serious problem in the courts, but sanctions are usually not the best way for courts to address the issue. Motions for sanctions are time consuming for both

274. See *supra* text accompanying note 207.

275. *Rimkus*, 688 F. Supp. 2d at 642–44.

276. *Id.* at 620.

277. *Id.* at 646.

courts and counsel, and consequently, they drive up the cost of litigation. Moreover, because sanctions are inherently punitive, motions for sanctions cause the level of contentiousness in litigation to increase. An especially antagonistic and high-stakes motion will not promote the spirit of cooperation and collaboration that is needed during electronic discovery.²⁷⁸

In addition, the use of adverse inference instructions as a form of sanctions creates an inconsistency in the division of labor between judges and juries with respect to fact-finding.²⁷⁹ In both *Pension Committee* and *Rimkus*, for example, the trial judges found it necessary to make detailed findings regarding the culpability of the spoliators and the relevance of the spoliated evidence in order to justify the sanctions.²⁸⁰ Yet both judges allowed their juries to make their own determinations on whether spoliation occurred as well as on the relevance and prejudicial effect of the spoliation.²⁸¹ It thus appeared that the judges were directing their juries to redo much of the fact-finding that the judges had already done.²⁸²

Instead of imposing an adverse inference instruction as a sanction, it would be more appropriate in most cases for trial courts to permit attorneys to offer evidence of spoliation and discovery misconduct at trial. Then each side could argue the permissible inferences that the jury should draw from this evidence.

Under the liberal standard for relevance in Federal Rule of Evidence 401, evidence of spoliation is admissible if: “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”²⁸³ The logical basis for the relevance of spoliation is “the common sense notion that a party’s destruction of evidence which it has reason to believe may be used against it in litigation suggests that the evidence was harmful to the party responsible for its destruction.”²⁸⁴ As the First Circuit explained in *Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*:

The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more

278. See generally THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf (“The Sedona Conference launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a ‘just, speedy, and inexpensive determination of every action.’”).

279. See *Nucor Corp. v. Bell*, 251 F.R.D. 191, 202 (D.S.C. 2008).

280. See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 476–96 (S.D.N.Y. 2010); *Rimkus*, 688 F. Supp. 2d at 642–46.

281. See *Pension Comm.*, 685 F. Supp. 2d at 497; *Rimkus*, 688 F. Supp. 2d at 646–47.

282. See *Nucor Corp.*, 251 F.R.D. at 203 (observing that this allocation of labor “makes little sense”).

283. FED. R. EVID. 401.

284. *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

likely to have been threatened by the document than is a party in the same position who does not destroy the document. The fact of destruction satisfies the minimum requirement of relevance: it has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be. *See* Fed.R.Evid. 401. Precisely how the document might have aided the party's adversary, and what evidentiary shortfalls its destruction may be taken to redeem, will depend on the particular facts of each case, but the general evidentiary rationale for the inference is clear.²⁸⁵

The First Circuit's analysis of the logical relevance of spoliation depended on the notice and intent of the spoliator.²⁸⁶ If a spoliator lacked knowledge of the content that was destroyed or if the destruction was accidental rather than deliberate, the spoliation would no longer be relevant.²⁸⁷ The requirements of the spoliator's notice and intent are instances of conditional relevance because evidence of spoliation lacks relevance unless these requirements are satisfied.

Federal Rule of Evidence 104(b) supplies the standard for the admissibility of conditionally relevant spoliated evidence. Rule 104(b) provides: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later."²⁸⁸

Under Rule 104(b), a trial court is not required to make a finding that a spoliator had notice of the spoliated evidence's relevance. Nor is the trial judge required to hold that the spoliator acted intentionally in order to admit evidence of spoliation. Instead, the trial court is required to make only a preliminary finding that there is a sufficient evidentiary foundation for a jury

285. *Nation-Wide Check Corp., Inc. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982).

286. *Id.*; *see also* *Booker v. Mass. Dep't of Pub. Health*, 612 F.3d 34, 46 (1st Cir. 2010) (noting that the foundation required for adverse inference is that the spoliator had knowledge of the claim and the potential relevance of the spoliated evidence to the claim); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) ("An adverse inference about a party's consciousness of the weakness of his case . . . requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.").

287. *See* *D'Onofrio v. SFX Sports Grp., Inc.*, No. 06-687 (JDB/JMF), 2010 WL 3324964, at *10, (D.D.C. 2010) ("When, as in this case, it is not a party's bad faith that leads to the destruction of evidence, its actions hardly bespeak an intention worthy of such a harsh punishment [as an adverse inference instruction] because the logical premise of the instruction—that the spoliator must have destroyed the evidence to keep any one from seeing it—is not there."); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 526 (D. Md. 2010); *McCORMICK*, *supra* note 54; *Dropkin*, *supra* note 48, at 1826 (spoliation inference does not hold true if the spoliator is innocent and may not hold true if the spoliator is merely negligent or reckless); *Maguire & Vincent*, *supra* note 57; *Nance*, *supra* note 64.

288. *FED. R. EVID. 104(b)*.

to determine that these conditions have been fulfilled.²⁸⁹ The jury then regains its place as the ultimate finder of fact.

Although both the trial court and the jury must consider the evidence of the spoliator's notice and intent with respect to the spoliation, the trial court's role under Rule 104(b) is limited to deciding whether it would be reasonable for the jury to find that the prerequisite conditions to relevance have been fulfilled. Consequently, the trial court's preliminary finding on the admissibility of the spoliated evidence would differ from the jury's ultimate finding of its relevancy, and the fact-finding roles of the trial court and jury would be neither inconsistent nor duplicative.

Under the conditional relevancy standard of Rule 104(b), a trial court would be obliged to admit evidence of spoliation even if it was not itself convinced of the spoliator's notice and intent with respect to the spoliation. Circumstantial proof is generally required for issues of knowledge and intent, and a spoliator's fault lies along a continuum ranging from accidental loss of evidence to bad faith.²⁹⁰ A jury's determination of a spoliator's mental state could require consideration of numerous factors such as the type of evidence, the timing and manner of spoliation, and the reasons the spoliator may offer for the destruction of the evidence.

In many cases, the trial court would have to admit the evidence of spoliation so that the jury could determine the spoliator's culpability, even though the court was not itself persuaded that the spoliator had knowledge of the contents of the spoliated evidence and destroyed it deliberately. For example, although Judge Scheindlin decided in *Pension Committee* that none of the plaintiffs had engaged in willful misconduct,²⁹¹ there may have been sufficient circumstantial evidence presented to satisfy the conditional relevance standard.²⁹²

289. See FED. R. EVID. 104 advisory committee's note, *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 198 (1972) ("The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them.").

290. See *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 267 (2d Cir. 1999) ("[Spoliation occurs] along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality." (quoting *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988))).

291. See *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 478 (S.D.N.Y. 2010).

292. For example, a reasonable jury might have concluded that William Hunnicutt, who was President of one of the plaintiffs, had knowledge of the contents of the emails he deleted and that he intentionally deleted them. *Id.* at 482. On the other hand, the judge would have to determine what issues the deleted emails may have been relevant to, and she would have discretion to exclude the evidence of spoliation under Federal Rule of Evidence 403 if its probative value was outweighed by other factors, such as that it was cumulative of other evidence.

Of course, the trial court would have discretion under Federal Rule of Evidence 403²⁹³ to exclude the evidence of spoliation if the court determined that the probative value of the evidence of spoliation was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the needless presentation of cumulative evidence. Depending on the circumstances, presentation of evidence of spoliation may be time consuming and confusing to the jury, particularly if the evidence would involve technical details concerning electronically stored information that would require expert testimony. If it was not clear that the spoliation occurred or what the contents of the spoliated evidence were likely to have been, a trial court might exclude the evidence of spoliation under Rule 403 on the grounds that the probative value of the evidence of spoliation was substantially outweighed by the costs involved in presenting it at trial.

The trial judges in both *Pension Committee* and *Rimkus* noted that, despite the spoliation, the innocent parties had been able to gather extensive evidence.²⁹⁴ As a consequence, by the time of trial, the trial judges could decide whether the evidence of spoliation was cumulative of other evidence that the innocent parties were able to introduce. The trial judges might then exclude the evidence of spoliation under Rule 403, making the adverse inference instructions unnecessary and inappropriate. Both *Pension Committee* and *Rimkus* were sufficiently complicated so as to make it difficult to determine during the pretrial discovery phase how significant the evidence of spoliation would be at trial. The respective judges may have been better served by waiting until after they had seen the evidence presented at the trial before ruling on whether to give an adverse inference instruction.

Once evidence of spoliation has been introduced, the attorney for the innocent party may urge the jury during closing arguments to draw an adverse inference from the spoliation.²⁹⁵ The attorney for the spoliator may respond with contrary arguments.²⁹⁶ Courts normally permit attorneys wide

293. FED. R. EVID. 403.

294. See *Pension Comm.*, 685 F. Supp. 2d at 479 (“The Citco Defendants have gathered an enormous amount of discovery—both from documents and witnesses.”); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 646 (S.D. Tex. 2010) (“At the same time, it is important that *Rimkus* has extensive evidence to use in this case.”).

295. See RICE, *supra* note 221, at 169–70 (“Regardless of the specific sanctions imposed by a court for spoliation, injured parties can argue [the] logical inference to the jury, asking its members to draw a negative conclusion about the offending party’s claim.”).

296. See *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 750 (8th Cir. 2004) (“A permissive inference is subject to reasonable rebuttal.”).

latitude in closing arguments,²⁹⁷ and this includes arguing reasonable inferences from the evidence.²⁹⁸

Whether the trial judge should emphasize the adverse inference from spoliation with a jury instruction would be a matter for the judge's discretion.²⁹⁹ In most cases, the judge should leave the adverse inference to the arguments of the attorneys and not give a jury instruction.³⁰⁰ There are myriad inferences that the jury must choose from in the course of its deliberations,³⁰¹ and the judge could not possibly give a specific instruction for each of them.³⁰²

An adverse inference instruction is unnecessary in most cases because a jury ought to be able to understand the idea behind the adverse inference without an instruction. As Wigmore observed, "the inference, indeed, is one

297. See *Patterson v. Balsamico*, 440 F.3d 104, 119 (2d Cir. 2006) ("[A]ttorneys are given 'wide latitude in formulating their arguments' to the jury.") (quoting *Reilly v. Natwest Markets Grp. Inc.*, 181 F.3d 253, 271 (2d Cir. 1999)).

298. See *Soltys v. Costello*, 520 F.3d 737, 745 (7th Cir. 2008) ("Attorneys have more leeway in closing arguments [than in opening statements] to suggest inferences based on the evidence, highlight weaknesses in the opponent's case, and emphasize strengths in their own case."); *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1128–29 (10th Cir. 2000) ("[T]he cardinal rule of closing argument [is] that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence."); 75A AM. JUR. 2D *Trial* § 444 (2010) ("Counsel is granted wide latitude to discuss the merits of the case, both as to the law and facts, and is entitled to argue his or her case vigorously and to argue all reasonable inferences from the evidence, even though the inferences drawn are illogical or erroneous, and the law indulges a liberal attitude toward closing argument." (footnotes omitted)).

299. See *Booker v. Mass. Dep't of Pub. Health*, 612 F.3d 34, 46 (1st Cir. 2010) ("A trial court's decision to give or refuse an adverse inference instruction is reviewed for an abuse of discretion." (quoting *Gilbert v. Cosco Inc.*, 989 F.2d 399, 406 (10th Cir. 1993))). See also WEINSTEIN, *supra* note 138, § 107.21[2] ("The judge may indicate to the jury the inferences that may rationally be drawn from evidence before it.").

300. See *Grazier ex rel. White v. City of Philadelphia*, 328 F.3d 120, 127 (3d Cir. 2003) ("A District Court does not abuse its discretion by refusing to emphasize legal inferences favoring one side. Emphasizing arguable inferences to jurors is the job of advocates, not courts."); see also *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1334 (S.D. Fla. 2010) (holding that denial of adverse inference instruction did not preclude introduction of evidence and argument of counsel concerning spoliation); *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633, at *7 (M.D. Fla. Feb. 9, 2007) (holding that "the negligent destruction of evidence is insufficient to support an adverse inference instruction.").

301. See *Schulz v. Pa. R.R.*, 350 U.S. 523, 526 (1956) ("The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." (quoting *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944))).

302. See *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1051 (7th Cir. 2000) ("Rather than describing each possible inference of the evidence, the judge may and usually should leave the subject of the interpretation of the evidence to the argument of counsel."); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) ("Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel.").

of the simplest in human experience”³⁰³ An adverse inference jury instruction may also accord undue weight to the spoliation of evidence.³⁰⁴ Even if a jury instruction states that it only permits and does not require an adverse inference from spoliation, a jury is likely to view the instruction as having the weight of law.³⁰⁵ In contrast, jurors are likely to view the arguments of attorneys with a healthy bit of skepticism, especially if, as is often the case, the jury is instructed that statements of attorneys are not evidence.³⁰⁶

Adverse inferences are not all alike, and the strength of a particular adverse inference may depend on a variety of factors. Whether it is reasonable for a jury to infer that lost or destroyed evidence was unfavorable to the spoliator would surely depend on the claims being asserted and the relationship of the evidence to the claims. The adverse inference from spoliation would be especially strong if it was clear that the lost or destroyed evidence was at the heart of the case, as was the missing jewel of the chimney sweeper in *Armory*³⁰⁷ and the missing airbag and truck in *Flury*.³⁰⁸ In these instances, the spoliator must have known that the evidence needed to be preserved.

Weighing the probative value of spoliation might be more complicated in other cases. In an employment discrimination case, for example, determining the strength of any adverse inference arising from the deletion of emails would probably require considering a multitude of factors. These would include where the emails were stored, who had access to them, who destroyed them, when they were created and destroyed, the content of other emails, whether other evidence in the case was consistent with the adverse inference, and whether the emails were deleted willfully or accidentally.

The *Zubulake* line of cases illustrates the complexity of the analysis that may be needed. In *Zubulake I*³⁰⁹ and *III*³¹⁰ Judge Scheindlin ruled that the

303. See *supra* text accompanying note 42.

304. See *Burgess v. United States*, 440 F.2d 226, 234 (D.C. Cir. 1970) (noting the danger that an instruction that the jury may draw an adverse inference from a party’s failure to call a missing witness “may add a fictitious weight to one side or another of the case”).

305. See *id.* at 235 (“[A]n instruction of the court granting to the jury the right to draw the inference of unfavorable testimony . . . has the weight of law, even when it only permits and does not require the inference, whereas counsel’s argument is only that.”); Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair*, 44 Md. L. Rev. 137, 168 (1985) (“[A] jury instruction has the weight of law, even if, in the case of instruction as to an inference, it only permits and does not require the inference.”).

306. See *Boyde v. California*, 494 U.S. 370, 384 (1990) (“[Arguments of counsel] are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates.”); Stier, *supra* note 305, at 168 (“The formal distinction between argument and instruction is well recognized. . . . Jurors may treat the argument for what it is.”).

307. See *supra* text accompanying notes 36–38.

308. See *supra* text accompanying notes 74–77.

309. *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (“*Zubulake* is entitled to discovery of the requested e-mails so long as they are relevant to her claims, which they clearly are.”).

310. *Zubulake v. UBS Warburg LLC (Zubulake III)*, 216 F.R.D. 280, 285 (S.D.N.Y. 2003) (“[A] review of these e-mails reveals that they are relevant.”).

emails on the defendant's backup tapes were relevant in the sense that they bore on the issues in the litigation.³¹¹ Nevertheless, she decided in *Zubulake IV* that Zubulake had not shown that the lost tapes contained relevant information. There was no reason to believe that the lost emails were likely to have supported Zubulake's claim of employment discrimination and it was unlikely that any relevant emails had been on the particular tapes that were lost.³¹² Judge Scheindlin ultimately decided in *Zubulake V*, however, that the contents of the lost tapes would have been favorable to Zubulake based on the content of emails recovered from other sources and the culpability of the defendant's employees for willfully deleting emails.³¹³

The probative value of spoliation is often highly nuanced and dependent on the particular circumstances of the case. An adverse inference instruction could not satisfactorily set out all the considerations that should go into weighing the probative value of the spoliation without delving into many of the details surrounding the spoliation. Any adverse inference instruction that attempted to do so would probably fail to be truly neutral and would be cumbersome and confusing to the jury.

Drawing the connection between spoliation and an adverse inference is better left to the advocacy of counsel, who can best bring out the considerations for and against the inference without being concerned about maintaining the neutrality required for a jury instruction.³¹⁴ An attorney may be tempted to exaggerate the probative value of spoliation in a particular case, but doing so may risk loss of credibility with the jury and also invite persuasive rebuttal from opposing counsel. As always, the court may intervene if an attorney's argument is improper, but it generally should allow zealous advocacy so long as the argument stays within reasonable bounds.³¹⁵

Professor Dale Nance has argued in a series of articles that adverse inference instructions have a number of shortcomings, and that instead of having juries determine the consequences of spoliation, courts should impose sanctions such as issue preclusion and dismissals or default judgments

311. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003) ("I found in *Zubulake I* and *Zubulake III* that the e-mails contained on UBS's backup tapes were, by-and-large, relevant in the sense that they bore on the issues in the litigation.").

312. *Id.* ("Accordingly, Zubulake has not sufficiently demonstrated that the lost tapes contained relevant information.").

313. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 437 (S.D.N.Y. 2004) ("I am convinced that the contents of the lost tapes would have been similarly, if not more, favorable [than the content of emails recovered from other sources].").

314. *See United States v. Sblendorio*, 830 F.2d 1382, 1391 (7th Cir. 1987) ("Arguing inferences is standard business among lawyers.").

315. *See McCORMICK, supra* note 54, § 264 ("[I]f an argument on the failure to produce proof is fallacious, the remedy is the answering argument and the jury's good sense. Thus, the judge should be required to intervene only when the argument, under the general standard, can be said to be not merely weak or unfounded, but unfair and prejudicial.").

in order to shield juries from having to consider spoliation.³¹⁶ He criticizes not only adverse inference instructions but also attorney arguments to juries concerning adverse inferences.³¹⁷ His position is that the role of juries should be limited to making the final decision in the case while the trial judge should manage procedural matters such as the discovery process.³¹⁸

Professor Nance also argues that evidence of spoliation lacks probative value and risks unfair prejudice.³¹⁹ Professor Nance would allow attorneys to argue that a jury may make inferences based on the absence of supporting evidence, but he distinguishes arguments based on a party's spoliation of evidence, which he finds unacceptable.³²⁰

Professor Nance is right that juries should not be imposing sanctions on parties for violations of their discovery obligations, including for spoliation of evidence. However, adverse inference instructions do not direct juries to impose sanctions, and it would be improper for attorneys to argue to juries that they should impose sanctions for spoliation. Instead, adverse inference instructions inform juries that they are permitted to draw inferences from spoliation that the spoliated materials would have been unfavorable to the spoliator.³²¹ How a jury will respond to either a jury instruction or attorney argument for adverse inferences will depend on the particular circumstances of the case. In some cases, the fact of spoliation may have little probative value concerning the content of the spoliated material and whether it was unfavorable to the spoliator, and it should be expected that juries would

316. See Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 879 (1991) ("When used in jury trials, the classic adverse inference relieves the trial judge of the responsibility of deciding what to make of the claim of suppression, but only by placing the burden on participants more poorly suited to bear it."); Nance, *supra* note 60, at 1091 ("[T]he use of adverse inferences should be radically curtailed in favor of simpler remedies that are imposed by the court without the involvement of the jury."); Nance, *supra* note 64, at 660 ("My main point is that . . . it is the duty of the trial judge to assure that the trier of fact is not placed in the position of having to decide a case under conditions of unreasonably incomplete evidence.").

317. See Nance, *supra* note 60, at 1091 ("[M]ost of what I have to say does not depend on whether such an inference is encouraged by an argument or sanctioned by a jury instruction.").

318. See Nance, *supra* note 60, at 1106–07; Nance, *Missing Evidence*, *supra* note 316, at 879 ("Questions about litigation tactics and the plausibility of excuses for nonpresentation of evidence are probably better handled by the trial judge, whose experience and training provides an expertise relative to such questions that is not shared by the jury.").

319. Nance, *supra* note 60, at 1099–103.

320. Nance, *supra* note 60, at 1119–20 ("Counsel would still be able to observe that a fact endorsed by the opponent is unsupported or poorly supported by the evidence before the court, or that the parties' investigation has not ruled out alternative hypotheses about the events being litigated. What they would not be allowed to do is to identify some particular potential witness or tangible thing, known or claimed to exist or to have existed, and argue or suggest that significance attaches to the fact that the opponent has destroyed or withheld that witness or thing from the court. Such an argument is almost always intended to elicit the inference that the opponent is hiding something from the jury." (footnote omitted)).

321. See, e.g., *supra* text accompanying notes 109, 207, 246–247.

decide accordingly. But in other cases, spoliation may have substantial probative value.

For example, in *Rimkus*, the defendants admitted that they deleted large numbers of electronic documents and emails after leaving their employer to set up a competing company. The explanations they gave in their depositions were inconsistent and lacked evidentiary support.³²² It would not be unreasonable for a jury to infer from these facts that the defendants took confidential information from their former employer and breached noncompetition and nonsolicitation covenants by contacting their former employer's clients, as the plaintiff alleged in the complaint.

It bears emphasis that the rationales and purposes for adverse inferences differ from those for sanctions. Adverse inferences are evidentiary, and they are based on the extent of the logical tendency, if any, that evidence of spoliation may have to prove the probable content of the spoliated material. In contrast, sanctions are punitive, and courts impose them to deter spoliation in order "to prevent unfair prejudice to litigants and to insure the integrity of the discovery process."³²³ As such, the standards for adverse inferences differ from the standards for sanctions, such as dismissals, default judgments, or issue preclusion. Willfulness or bad faith should generally be required for an adverse inference because without willfulness or bad faith, there is no logical connection between spoliation and the content of the spoliated material.³²⁴

On the other hand, sanctions may be warranted in the absence of willfulness or bad faith in order to serve the goals of deterrence, level the playing fields for litigants, and preserve the integrity of the judicial process. For example, in *Silvestri v. General Motors Corp.*, the record was not clear whether the spoliation was negligent or deliberate, but the appellate court ruled that the sanction of dismissal was not an abuse of the trial court's discretion because the spoliation was so highly prejudicial that it would have prevented the defendant from being able to defend the case.³²⁵ Moreover, in *Flury v. Daimler Chrysler Corp.*, the jury evidently refused to draw an adverse inference against the plaintiff for spoliation after receiving an adverse inference instruction because it returned a verdict for the plaintiff. The appellate court then reversed and ordered dismissal on account of the prejudice to the defendant that resulted from the spoliation.³²⁶

322. See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642–43 (S.D. Tex. 2010).

323. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005).

324. See *supra* note 287.

325. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593–95 (4th Cir. 2001).

326. *Flury*, 427 F.3d at 942–43, 947. See also *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 136 (S.D. Fla. 1987) (finding entry of default judgment as a sanction for spoliation was appropriate in part because permitting an adverse inference would not be an effective deterrent).

Thus, dismissal or a default judgment may be an appropriate remedy for spoliation in some cases when the spoliator's conduct was especially egregious or the spoliation caused severe prejudice to the innocent party.³²⁷ In addition, monetary sanctions may be justifiable if spoliation has caused an innocent party to incur additional expense to obtain discovery of electronically stored information from alternative sources.³²⁸ Other sanctions listed in Federal Rule of Civil Procedure 37(b)(2)(A)³²⁹ may also be appropriate where an adverse inference would not be an effective remedy for spoliation.

While sanctions would be a superior remedy for spoliation in some cases, adverse inferences are better in those circumstances where inferences about the content of the spoliated materials are reasonable on account of a logical connection between the fact of spoliation and the probable content of the spoliated material. Where the fact of spoliation has probative value, the trial court should permit the jury to consider it along with the rest of the evidence rather than removing the jury from the process by imposing dispositive sanctions, such as dismissal, default judgment, or issue preclusion. Otherwise, trial by discovery may threaten to replace trial by jury.

CONCLUSION

The spoliation of evidence has a long history in the courts. Traditionally, courts have relied on adverse inferences as a remedy for spoliation. Adverse inferences are not always adequate, though, particularly where it is difficult to infer the contents of the spoliated material. With the development of discovery, courts have increasingly turned to the use of sanctions as a deterrent against spoliation. A significant recent trend has been the use of adverse inference jury instructions as sanctions in cases involving electronic discovery, in part because courts consider them a compromise between non-action and more severe, final sanctions such as dismissal or default judgment.

Spoliation of evidence has attracted increasing concern in the past couple of decades due to the explosion in the volume of electronically stored information, the increasing use of electronically stored information in litigation as a source of proof of factual issues, and the ease with which

327. See *Flury*, 427 F.3d at 944–45; *Silvestri*, 271 F.3d at 593.

328. See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 647–48 (S.D. Tex. 2010) (imposing monetary sanctions of costs and attorneys' fees reasonably incurred in investigating spoliation, obtaining lost emails from third parties, and taking additional depositions concerning spoliation); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 497 (S.D.N.Y. 2010) (awarding reasonable costs, including attorneys' fees, associated with reviewing declarations concerning spoliation, deposing declarants, and filing motion for sanctions).

329. FED. R. CIV. P. 37(b)(2)(a). These sanctions include directing that designated facts be taken as established, prohibiting the spoliator from supporting or opposing designated claims or defenses, prohibiting the spoliator from introducing designated evidence, and the striking of pleadings in whole or part.

electronically stored information may be destroyed. Emails have probably received the most attention, as lawyers have been able to identify emails that opposing parties have deleted by cross-checking sent and received email copies and email copies that have been sent to multiple parties. Even though copies of the deleted emails are recovered, the lawyers still seek sanctions for the spoliation, including adverse inference instructions regarding possible other deleted emails that the lawyers could not recover. This has led to spoliation being denominated "the newest battleground of contemporary litigation."³³⁰

The concern over spoliation is highlighted by two significant recent cases in which prominent federal judges took differing approaches to dealing with spoliation of evidence. Both Judge Scheindlin and Judge Rosenthal decided to give adverse inference instructions as sanctions for spoliation of evidence. However, they used different standards for the culpability required for imposing the sanctions.

Following Second Circuit precedent, Judge Scheindlin imposed sanctions for spoliation that was grossly negligent rather than willful or in bad faith. In contrast, Judge Rosenthal followed Fifth Circuit precedent that required bad faith for the imposition of the sanction of an adverse inference instruction. In addition, the terms of the adverse inference instructions that the two judges decided to give differed materially. Judge Scheindlin's adverse inference instruction stated that the jury may presume, if it chose, that the spoliated evidence was both relevant and would have been unfavorable to the spoliators. In contrast, Judge Rosenthal would ask the jury to decide whether the parties intentionally deleted evidence and then, if it found that they had done so, to decide whether to infer that the deleted evidence would have been unfavorable to the parties.

Of the two approaches, Judge Rosenthal's jury instruction is preferable. Under Federal Rule of Evidence 301, juries should generally not be instructed on the effect of presumptions because a presumption shifts the burden of going forward with the evidence, which should be handled by the judge. Also, the Fifth Circuit precedent that requires bad faith for an adverse inference concerning spoliation makes more sense than the Second Circuit precedent because there is no logical basis for a jury to draw an adverse inference from spoliation unless the spoliator acted willfully or in bad faith.

What would be preferable to either of these approaches, however, would be for trial judges to move away from the use of adverse inference instructions as sanctions for spoliation. Instead, judges should simply allow attorneys to offer evidence of spoliation during the trial to the extent it is relevant. Then, after the presentation of the evidence, the judge should allow attorneys to argue any adverse inferences to the jury.

330. See Shapiro, *supra* note 1.

Like other inferences, adverse inferences should be based on the logical relationship between the spoliation of evidence and the issues in the case rather than on the policies of deterrence and punishment that provide the basis for sanctions. Instead of arguing over the opposing party's preservation of evidence to the judge during discovery, attorneys could focus on preparing to argue to the jury the significance of the evidence of spoliation to the merits of the case. Where spoliation is particularly egregious or has severely prejudiced a party's case, the sanctions of dismissal or a default judgment are available, but for the more common circumstances, the better remedy for spoliation is attorney advocacy rather than sanctions.